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ATTACHMENT A (PUBLIC VERSION)

**Before the
CALIFORNIA PUBLIC UTILITIES COMMISSION**

Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).

Application 14-04-013

and related matters

Application 14-06-012

Supplemental Expert Report and Declaration

of

LEE L. SELWYN

on behalf of the

Office of Ratepayer Advocates
of the
California Public Utilities Commission

February 5, 2015

SUPPLEMENTAL EXPERT REPORT AND DECLARATION OF LEE L. SELWYN

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S-1 [BEGIN TWC HIGHLY CONFIDENTIAL]

[END TWC HIGHLY CONFIDENTIAL]

S-2 Federal Communications Commission, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, Notice of Proposed Rulemaking*, MB Docket No. 14-261, FCC 14-210 Rel. December 19, 2014

SUPPLEMENTAL EXPERT REPORT AND DECLARATION OF LEE L. SELWYN

I, Lee L. Selwyn, declare as follows:

Introduction

1. I am the same Lee L. Selwyn who, on December 10, 2014, submitted an Expert Report and Declaration in the above-captioned proceedings on behalf of the Office of Ratepayer Advocates (“ORA”). On or about December 22, 2014, Time Warner Cable, Inc. (“TWC”) disclosed approximately 29,093 individual documents (“TWC Supplemental Disclosure”) to the Federal Communications Commission (“FCC”) that it had “discovered ... were not timely produced to the FCC” in TWC’s original responses to the FCC’s August 21, 2014 *Information and Data Request* directed to TWC.¹ TWC’s original disclosure consisted of 921,678 documents; Comcast had produced 719,109 documents, and Charter’s disclosure consisted of 634,092 documents – some 2,303,972 documents in all. On or about December 23, 2014, access to the TWC Supplemental Disclosure was made available to ORA and to its consultant via an online electronic discovery (“e-discovery”) system known as *Relativity* hosted by TWC’s e-discovery consultant, Huron Consulting Group.

2. I was only able to examine approximately 1,000 of the 29,093 individual documents that were included in the TWC Supplemental Disclosure. This examination was made using the limited keyword and Lexis-type search capabilities that had been made available to ORA in the

1. See, letter dated December 22, 2014 from William T. Lake, Chief, Media Bureau, Federal Communications Commission, to Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corporation; Steven Teplitz, Senior Vice President, Government Relations, Time Warner Cable Inc.; and Catherine Bohigian, Executive Vice President, Government Affairs, Charter Communications, Inc. Available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-331206A1.pdf (accessed 2/3/15).

1 abridged version of *Relativity* that was provided to ORA by TWC's e-discovery consultant. My
2 searches were directed primarily at documents containing words and phrases relating to
3 "competition," "price," "elasticity," "interconnect agreements," "OTT ('over-the-top')," and
4 "VMPVD" ("Virtual Multichannel Programming Video Distribution") Service.

5
6 3. Given that the Joint Applicants are each vertically integrated providers of broadband,
7 multichannel video, and voice telephone services, and that each offers bundled services that
8 include video, voice, and Internet for a bundled price, information on the potential for the
9 proposed merger to diminish competition in video is relevant in the review of the effects of the
10 merger on broadband. TWC and Comcast both provide the capability for their MVPD
11 subscribers to access video programming service to which they subscribe via streaming over the
12 Internet, and there is no *technical* reason why this same capability could not be offered on a
13 stand-alone basis without requiring an MVPD subscription. Tying video programming to
14 broadband by a merged Comcast/TWC may operate to deter broadband facilities expansion by
15 other Internet Service Providers (ISPs) that do not themselves have the capability to bundle
16 broadband and video services. This limitation has the potential to adversely affect the
17 reasonable and timely deployment of broadband in California.

1 Documents produced by TWC in its Supplemental Disclosure to the FCC belie the Joint
2 Applicants' contention that TWC and Comcast do not compete with one another, and
3 confirm that, going forward, the two companies must be considered to be potential direct
4 competitors in relevant product and geographic markets.
5

6 4. Due to the limited functionality of the e-discovery access that was made available to
7 ORA, coupled with the extraordinarily large number of documents that had been included in the
8 Joint Applicants' FCC disclosures, there was no practical means by which I could examine more
9 than a very small fraction of the entire FCC production. The considerably smaller volume of
10 documents that were included in TWC's Supplemental Disclosures offered a more manageable
11 undertaking. In this Supplemental Expert Report and Declaration, I confine my discussion to
12 two related and particularly relevant documents that were included in TWC's Supplemental
13 Disclosure. These documents undermine the primary factual claim being advanced by the Joint
14 Applicants in support of their proposed merger – i.e., that by virtue of their non-overlapping
15 geographic operating territories, TWC, Comcast, Charter and Bright House do not compete
16 against each other, and for that reason the merger will not diminish competition in the broad-
17 band, MPVD and voice telephone markets that the Joint Applicants serve. These documents
18 consist of a PowerPoint presentation and a Supplemental Materials appendix, apparently
19 prepared for an offsite Board of Directors meeting (“TWC Board of Directors Documents”).²
20 Attachment S-1 to this Report contains the two documents, designated by TWC as “Highly

2. [BEGIN TWC HIGHLY CONFIDENTIAL]

CONFIDENTIAL]

. [END TWC HIGHLY

Confidential.” The cover pages of both PowerPoint decks are titled [BEGIN TWC HIGHLY
CONFIDENTIAL] “

[END TWC HIGHLY
CONFIDENTIAL]. The existence and the content of these documents show the Joint
Applicants’ “we do not compete with one another” contention to be fundamentally false.

5. The rationale advanced by the Joint Applicants in support of their “we do not compete
with each other” contention is that, historically, their individual geographic coverage areas were
inextricably linked to the geographic scope of their respective physical cable distribution
infrastructures. The Joint Applicants’ expert, Dr. Mark Israel, expressly premised his support for
this theory on the basis that entry by one of the Joint Applicants into the other’s operating area
would require overbuilding a new network entirely from scratch, and that the costs of such an
undertaking would be prohibitively expensive:

I understand that neither Comcast nor TWC has any plans in either the short-term
or the long-term to expand into one another’s footprint, because such an expansion
would not be sufficiently profitable to pursue. Overbuilding (i.e., building a
network entirely from scratch) in one another’s service area would be a significant
expense made more difficult to recover by the competitive video and
broadband marketplace that already exists.³

But if competitive entry into the multichannel video distribution service market can be
accomplished *without* overbuilding, the economic barrier to MVPD entry into the incumbent
provider’s operating area evaporates. Going forward and industry-wide, a growing proportion of

3. Declaration of Mark A. Israel (Exhibit 6 to FCC Application), April 7, 2014, at para. 115, footnote omitted.

1 video content is and will continue to be obtained from “Over-the-Top” (“OTT”) streaming video
2 services (also referred to as “Online Video Distributors” or “OVDs”) transported via the
3 customer's high-speed broadband Internet access service, in lieu of being delivered via MPVD
4 cable services. Evidence of this trend can be observed in the growing number of customers who
5 are “cutting the cord” – i.e., discontinuing cable-based MVPD service and taking only high-
6 speed broadband access. For example, on January 29, 2015, TWC reported fourth quarter 2014
7 “Residential high-speed data net additions of 168,000” and “Residential video net declines of
8 38,000.”⁴ Notably, while the widespread availability of high-speed broadband access eliminates
9 the principal economic barrier to out-of-footprint MVPD entry, the high-speed broadband access
10 so essential for competition for MVPD service does not present the same competitive potential.
11 As gatekeepers with respect to all OTT services, the Joint Applicants possess both the incentive
12 and the ability to frustrate entry to any market segment that must pass through their “gate.”
13 Among other things, they have the ability and the incentive to leverage their monopoly or near-
14 monopoly control of broadband access to limit OTT video competition by raising the price of
15 stand-alone broadband access while offering bundles of broadband plus video at a very small
16 increment relative to the price of broadband alone.

17
18 6. Unlike traditional MVPD service whose geographic market for any given provider is
19 confined to its physical distribution infrastructure, OTT services are technically capable of being
20 furnished to any customer with a broadband Internet connection worldwide. Any limit on the

4. *Time Warner Cable Reports 2014 Fourth-quarter and Full-year Results*, January 29, 2015, at 2, available at <http://ir.timewarnercable.com/investor-relations/quarterly-earnings/default.aspx> (accessed 2/2/15).

1 extent of the geographic market is entirely transactional, imposed to conform to the terms of
2 content licensing agreements or to support a geographically-based tacit or overt market
3 allocation strategy among collaborating service providers.

4
5 7. The specific TWC Board of Directors Documents reproduced in Attachment S-1 address
6 the potential for the company to offer [BEGIN TWC HIGHLY CONFIDENTIAL]

7
8
9
10
11
12 5
13 .”⁶ [END TWC HIGHLY CONFIDENTIAL] The
14 bedrock contention being advanced by the Joint Applicants in support of the merger – i.e., that
15 they do not compete with one another – is thus invalidated if TWC and Comcast [BEGIN TWC
16 HIGHLY CONFIDENTIAL]

17 . [END TWC HIGHLY CONFIDENTIAL]

18
19 8. Indeed, the *Horizontal Merger Guidelines* (“HMG”) expressly addresses precisely this
20 condition: “For example, if one of the merging firms has a strong incumbency position and the

5. TWC Board of Directors Documents, at 14.

6. *Id.*, emphasis supplied.

1 other merging firm threatens to disrupt market conditions with a new technology or business
2 model, their merger can involve the loss of actual or potential competition.”⁷ Moreover, the
3 TWC document also specifically addresses [BEGIN TWC HIGHLY CONFIDENTIAL]

4
5
6
7 . [END TWC HIGHLY
8 CONFIDENTIAL]

9
10 9. The FCC recently initiated a *Notice of Proposed Rulemaking* (NPRM) wherein the
11 Commission “propose[s] to interpret the term MVPD to mean distributors of multiple linear
12 video programming streams, including Internet-based services.”⁸ For convenience, I have
13 included the full text of the NPRM in Attachment S-2. “A linear channel is one that distributes
14 programming at a scheduled time. Non-linear programming, such as video-on-demand (‘VOD’)

7. United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines 2010*, at §2.1.5, *Disruptive Role of a Merging Party*. See also §5.3, *Market Concentration*: “In analyzing mergers between an incumbent and a recent or potential entrant, to the extent the Agencies use the change in concentration to evaluate competitive effects, they will do so using projected market shares. A merger between an incumbent and a potential entrant can raise significant competitive concerns. The lessening of competition resulting from such a merger is more likely to be substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others.”

8. *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, Notice of Proposed Rulemaking*, MB Docket No. 14-261, FCC 14-210 Rel. December 19, 2014, at para. 6.

1 and online video content, is available at a time of the viewer's choosing."⁹ The term "Subscrip-
2 tion Linear ... refer[s] to Internet-based distributors that make available continuous, linear
3 streams of video programming on a subscription basis. This category includes ... Aereo's
4 service as it existed before the Supreme Court decision."¹⁰ MPVD status confers certain specific
5 privileges (and obligations) upon the service provider, including a requirement that broadcast TV
6 stations engage in good-faith negotiations for retransmission agreements, thus enabling the OTT
7 provider to carry live broadcast TV on terms that would be comparable to those being afforded
8 traditional MPVDs. Adoption of such rules would permit entities like Aereo to compete directly
9 with cable and satellite MPVDs. Classifying linear multichannel OTT services as MVPDs
10 would also ensure that traditional MVPD MSOs – e.g., Comcast and TWC – have the right to
11 enter into retransmission agreements covering any virtual MPVD service they might themselves
12 offer *outside of the geographic scope of their cable distribution infrastructure*.

13
14 10. The NPRM expressly recognizes that cable MVPDs are already offering OTT services
15 and that this will be a growing area of their operations:

16
17 The Commission has recognized that innovation must be encouraged, but not at
18 the expense of technology-neutral public policies. That is why the January [2014]
19 Technology Transitions Order emphasized the importance of preserving competi-
20 tion, consumer protection, and public safety. And that is why this NPRM
21 proposes to ensure that the rights and responsibilities of an MVPD are not
22 jeopardized by changes in technology. *This IP transition will enable cable*

9. *Id.*, at fn. 26, citing *Implementation of Section 304 of the Telecommunications Act of 1996, Fourth Further Notice of Proposed Rulemaking*, 25 FCC Rcd 4303, 4308, ¶ 14 n.43 (2010).

10. *Id.*, at para. 13.

Internet-based TVE services to the MSOs' *cable* video customers is entirely transactional; there is no *technical* reason why such TVE services cannot be offered on a stand-alone basis.

11. Notably, the analysis described in the TWC document, which was undertaken in

[BEGIN TWC HIGHLY CONFIDENTIAL]

. [END TWC HIGHLY CONFIDENTIAL] Since then,

several content providers have introduced their own OTT offerings, creating an *a la carte* pricing alternative to the traditional cable MVPD "tier" business model. [BEGIN TWC HIGHLY

CONFIDENTIAL]

[END TWC HIGHLY CONFIDENTIAL] DISH

Network, the satellite TV provider that is already classified as an MPVD and is thus entitled to

1 enter into retransmission deals, has just announced that it will offer an OTT service called
2 *SlingTV* that will provide a variety of premium cable channels including “12 Nielsen-rated
3 sports, lifestyle, family and news networks: ESPN, ESPN2, TNT, TBS, Food Network, HGTV,
4 Travel Channel, Adult Swim, Cartoon Network, Disney Channel, ABC Family and CNN” for a
5 flat \$20 per month.¹⁴ Once this service is launched (sometime this winter), the availability of
6 these channels via OTT will put additional pressure on all MSOs to expand their own VMPVD
7 initiatives. HBO will begin offering a generally-available OTT service sometime in the next
8 several months;¹⁵ Showtime’s *ShowtimeAnytime* streaming video service, currently limited to
9 existing Showtime cable subscribers, might well follow HBO’s lead and be offered to non-cable
10 subscribers on a stand-alone basis. CBS began offering *CBS All Access* in October 2014;¹⁶ and
11 various other content providers offer day-after-broadcast access to their programs via the world-
12 wide-web or a streaming video set-top box (e.g., Roku, AppleTV, Amazon Fire) either without

14. Dish Network Press Release, January 5, 2015, available at <http://about.dish.com/press-release/products-and-services/sling-tv-launch-live-over-top-service-20-month-watch-tvs-tablets> (accessed 2/2/15). Dish Network Corporation also provides satellite-based broadband Internet access, but at far slower speeds than are available from wireline broadband providers such as the Joint Applicants, and with limited transmission volumes (“data caps”) and other restrictions. The Dish Internet service is not intended to be used to stream video content. See, <http://www.dish.com/entertainment/internet-phone/satellite-internet/offer2/> (accessed 2/3/15). SlingTV is thus *not* being targeted or offered to Dish Internet customers; it *is* being targeted to “cord cutter” customers of wireline (cable or fiber) broadband who do not also take MVPD service from those same providers.

15. TimeWarner [not TWC] Press Release, October 15, 2014, “HBO Chairman and CEO Richard Plepler Announces HBO to Offer a Stand-Alone HBO Streaming Service in 2015,” available at <http://www.timewarner.com/newsroom/press-releases/2014/10/15/hbo-chairman-and-ceo-richard-plepler-announces-hbo-to-offer-a> (accessed 2/2/15). “So, in 2015, we will launch a stand-alone, over-the-top, HBO service in the United States. We will work with our current partners. And, we will explore models with new partners. All in, there are 80 million homes that do not have HBO and we will use all means at our disposal to go after them.”

16. CBS Corp. Press Release, October 16, 2014, “CBS Brings Programming Direct To Consumers With New Multi-Platform Digital Subscription Service,” available at <http://investors.cbcorporation.com/phoenix.zhtml?c=99462&p=irol-newsArticle&ID=1978514> (accessed 2/2/15).

1 charge or on a low-priced subscription basis. [BEGIN TWC HIGHLY CONFIDENTIAL]

2
3
4 [END TWC HIGHLY CONFIDENTIAL] it is
5 simply inconceivable that TWC, Comcast and Charter would not be pursuing OTT MVPD type
6 services both within and beyond their respective cable footprints going forward.
7

8 **Conclusion**
9

10 12. I have not identified any TWC document later than [BEGIN TWC HIGHLY
11 CONFIDENTIAL]

12
13
14 [END TWC HIGHLY CONFIDENTIAL] the numerous developments that have
15 occurred since then – including the initiation of an FCC NPRM expressly addressing precisely
16 this type of entry – confirm that TWC and Comcast *must be considered as direct potential, if not*
17 *actual, competitors going forward*. If the merger is allowed, the largest MVPD in the United
18 States, the firm most capable of competing aggressively within TWC's cable footprint, will be
19 taken out of the mix of rival providers. Similarly, if the merger is allowed, the second-largest
20 MVPD in the United States, the firm most capable of competing aggressively within Comcast's
21 cable footprint, will also be taken out of the mix of rival providers. Moreover, if the broadband
22 infrastructures of these two firms are combined, their “gatekeeper” capability will take on
23 fortress-like attributes. Thus, with the merger resulting in the potential for MVPD entry by

1 Comcast and TWC into each other's core service area essentially being taken off the table,
2 smaller potential MVPD competitors will be far less capable of creating any disruptive
3 competitive pressure on the incumbent Comcast/TWC entity.¹⁷ And without the opportunity to
4 compete for video services, the ability of any additional broadband providers to challenge the
5 merged Comcast/TWC high-speed broadband monopoly becomes even more unlikely. In light
6 of these important developments and the [BEGIN TWC HIGHLY CONFIDENTIAL]
7 , [END TWC
8 HIGHLY CONFIDENTIAL] the notion that these two companies do not compete with one
9 another, that their merger will have no adverse impact upon the level of competition within their
10 respective operating areas, cannot be sustained.

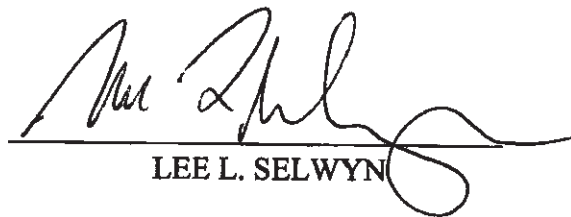
11

12

17. For example, per-subscriber retransmission and other content licensing fees typically diminish as the total number of subscribers increases. As the largest MVPD by far, a merged Comcast/TWC will have the ability to obtain content on terms far more favorable than would be available to any smaller OTT rival.

VERIFICATION

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information and belief, and if called to testify thereon I am prepared to do so.



LEE L. SELWYN

Executed at Boston, Massachusetts

this 5th day of February, 2015.

Attachment S-1

TWC Supplemental Disclosure Documents:

[BEGIN TWC HIGHLY CONFIDENTIAL]

[END TWC HIGHLY CONFIDENTIAL]

Attachment S-2

**Federal Communications Commission
Promoting Innovation and Competition in the Provision of
Multichannel Video Programming Distribution Services
Notice of Proposed Rulemaking
MB Docket No. 14-261, FCC 14-210
Released December 19, 2014**

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Promoting Innovation and Competition in the)	MB Docket No. 14-261
Provision of Multichannel Video Programming)	
Distribution Services)	

NOTICE OF PROPOSED RULEMAKING

Adopted: December 17, 2014

Released: December 19, 2014

Comment Date: [30 days after date of publication in the Federal Register]

Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Commission: Chairman Wheeler and Commissioners Clyburn and Rosenworcel issuing separate statements; Commissioners Pai and O'Rielly concurring and issuing separate statements.

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I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (“NPRM”), we propose to update our rules to better reflect the fact that video services are being provided increasingly over the Internet. Specifically, we propose to modernize our interpretation of the term “multichannel video programming distributor” (“MVPD”) by including within its scope services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming. Such an approach will ensure both that incumbent providers will continue to be subject to the pro-competitive, consumer-focused regulations that apply to MVPDs as they transition their services to the Internet¹ and that nascent, Internet-based video programming services² will have access to the tools they need to compete with established providers.³

2. Here the Commission faces, as it has before, the impact of technology transition. Incumbent cable systems have made plain their intent to use a new transmission standard that will permit cable systems to deliver video via IP, and other innovative companies are also experimenting with new business models based on Internet distribution.⁴ That is not surprising: Over-the-air television has moved from analog transmission to digital. The telephone networks of the 20th Century have become broadband networks, providing a critical pathway to the Internet. And, in our January Technology Transitions Order, the Commission encouraged experiments that assess the impact on consumers of the coming transition from traditional copper facilities to new telecommunications networks composed of fiber, copper, coaxial cable, and/or wireless connections.

¹ We see daily news that cable operators and satellite television providers are obtaining rights for online distribution of content. Sam Adams and Christian Plumb, *Verizon CEO says to launch Web TV product in 2015*, REUTERS, September 11, 2014, available at <http://www.reuters.com/article/2014/09/11/us-verizon-comms-towers-idUSKBN0H61KB20140911> (reporting that Sony, Dish Network, DIRECTV and Verizon are each developing Internet-delivered streaming video services that are a “viable alternative to cable TV service.”); Edmund Lee, Scott Moritz and Alex Sherman, *Dish Leads in Race to Offer Online TV to Compete With Cable*, BLOOMBERG, March 15, 2014, available at <http://www.bloomberg.com/news/2014-03-04/dish-takes-lead-in-race-to-offer-streaming-tv-to-rival-cable.html> (“If Dish goes ahead with an online service, competitors could follow -- including cable companies like Comcast and Cablevision Systems Corp., which could move out of their traditional regions to offer TV nationwide, said Bernard Gershon, a digital media consultant in New York.”); Chris Young, *Industry awaits linear OTT experiment*, SNL KAGAN, July 18, 2014, available at <http://www.snl.com/interactivex/article.aspx?id=28627040&KPLT=2>; Comcast branches out cloud DVR, live streaming service, CED MAGAZINE, May 8, 2014, available at <http://www.cedmagazine.com/news/2014/05/comcast-branches-out-cloud-dvr-live-streaming-service> (“Like other video service providers, Comcast is focused on offering live streaming out of the home.”). AT&T’s U-Verse service is delivered via Internet Protocol (“IP”) today. See AT&T, *WHAT IS IPTV?* (2009), available at https://www.att.com/Common/about_us/files/pdf/IPTV_background.pdf. In recognition of the increasing prevalence of Internet distribution of video, the National Cable & Telecommunications Association has renamed its annual Cable Show as INTX: the Internet and Television Expo, “in an effort to broaden the three-day gathering to include online video providers and distributors beyond the traditional Cable Show crowd.” Kent Gibbons, *NCTA: ‘Cable Show’ Convention Becoming INTX*, MULTICHANNEL NEWS (Sept. 17, 2014), <http://www.multichannel.com/ncta-cable-show-convention-becoming-intx/383922>.

² For readability throughout this NPRM, we use the term “Internet-delivered” to refer to any service delivered using IP whether or not it uses the public Internet, except for cable service. See *infra* ¶ 71.

³ See Letter from Seth Greenstein, Counsel to Aereo, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 12-83, at 2 (filed Oct. 10, 2014) (“Particularly in the wake of adverse judicial and agency decisions over the last several years, linear online streaming services likely cannot attract the level of investment necessary to create meaningful competition to incumbent business models without a clear path of regulatory certainty.”).

⁴ See *supra* n.1. See also Brian Santo and Mike Robuck, *DOCSIS 3.1 takes center stage at Cable-Tec Expo*, CED MAGAZINE, (Nov. 21, 2012, 9:56 AM), <http://www.cedmagazine.com/articles/2012/11/docsis-31-takes-center-stage-at-cable-tec-expo>.

3. The Commission has recognized that innovation must be encouraged, but not at the expense of technology-neutral public policies. That is why the January Technology Transitions Order emphasized the importance of preserving competition, consumer protection, and public safety. And that is why this NPRM proposes to ensure that the rights and responsibilities of an MVPD are not jeopardized by changes in technology. This IP transition will enable cable operators to untether their video offerings from their current infrastructure, and could encourage them to migrate their traditional services to Internet delivery. With these changes on the horizon, it becomes important to interpret the statutory definition of MVPD to ensure that our rules apply sensibly and in a way that encourages innovation regardless of how service is delivered and that the pro-consumer values embodied in MVPD regulation will continue to be served. In so doing, we take note of the regulatory requirements that cable operators must adhere to as they use new technology to offer services, and we invite comment on the regulatory treatment of additional services that cable operators may offer.

4. Adoption of a technology-neutral MVPD definition will not only preserve current responsibilities, it may create new competitive opportunities that will benefit consumers. Increasingly, companies – incumbents and new entrants alike – are interested in using the Internet as the transmission path for packages of video channels.⁵ In initiating this proceeding, our goal is to bring our rules into synch with the realities of the current marketplace and consumer preference where video is no longer tied to a certain transmission technology.⁶

5. Specifying the circumstances under which an Internet-based provider may qualify as an MVPD, possessing the rights as well as responsibilities that attend that status, may incent new entry that will increase competition in video markets. In particular, extending program access protections to Internet-based providers would allow them to “access[] critical programming needed to attract and retain subscribers.”⁷ And extending retransmission consent protections and obligations to those providers would allow them to enter the market “for the disposition of the rights to retransmit broadcast signals.”⁸ Broadcast and cable-affiliated programming could make Internet-based services attractive to customers, who would access the services via broadband. The resulting increased demand for broadband may in turn provide a boost to the deployment of high-speed broadband networks.

6. In this *NPRM*, we seek comment on possible interpretations of the term MVPD as used in the Communications Act of 1934, as amended (the “Act”) and seek comment on how each of those interpretations would affect the industry and consumers. In Section III.A, we seek comment on two possible interpretations:

- We propose to interpret the term MVPD to mean distributors of multiple linear video programming streams, including Internet-based services.

⁵ See *supra* n.1.

⁶ See *Technology Transitions; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition; Connect America Fund; Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services And Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Numbering Policies for Modern Communications*, 29 FCC Rcd 1433, 1446, ¶ 37 (2014) (“we seek both to advance new network technologies and learn how best to protect and enhance the core statutory values of public safety, universal access, competition, and consumer protection.”); *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 27 FCC Rcd 787, 791-2, ¶ 5 (2012) (recounting the evolution of video distribution methods).

⁷ *Revision of the Commission’s Program Access Rules*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 12605, 12608, ¶ 3 (2012).

⁸ S. Rep. No. 92, 102nd Cong., 1st Sess. (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1169.

- We tentatively conclude that this interpretation is a reasonable interpretation of the Act, and is most consistent with consumer expectations and conditions in the industry.
- We also seek comment on an alternative interpretation that would require a programming distributor to have control over a transmission path to qualify as an MVPD.
 - We invite comment on whether this interpretation is consistent with the Act and Congressional intent and how this interpretation would apply as companies begin to offer subscription linear video services over the Internet.

7. In Section III.B, we seek comment on the effects that either interpretation would have on entities that are classified as MVPDs, consumers, and content owners.

- We seek comment on how each interpretation would benefit and burden entities that would be subject to our rules.
 - We also ask whether we should consider exemption or waiver of certain regulations, if allowed under the statute.
 - We seek comment on whether to modify our retransmission consent “good faith” negotiation rules with respect to Internet-based MVPDs to protect local broadcasters.
- We seek comment on what impact these interpretations would have on content owners, including broadcasters and cable-affiliated programmers.
- Finally, we seek comment on how to ensure that our interpretation will promote competition and broadband adoption, consistent with the Act and Commission policy.

8. In Section III.C, we note that the fact that an entity uses IP to deliver cable service does not alter the classification of its facility as a cable system and does not alter the classification of the entity as a cable operator. In other words, those video programming services provided over the operator’s facilities remain subject to regulation as cable services. We seek comment on the regulatory status of purely Internet-based linear video programming services that cable operators and direct broadcast satellite (“DBS”) providers may choose to offer in addition to their traditional services.

II. BACKGROUND

9. The Act defines an MVPD as:

[A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.⁹

The Act also defines the terms “channel” and “video programming,” which are used in the MVPD definition. A “channel” is defined as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined

⁹ 47 U.S.C. § 522(13); *see also* 47 C.F.R. §§ 76.64(d), 76.71(a), 76.905(d), 76.1000(e), 76.1200(b), 76.1300(d).

by the Commission by regulation).”¹⁰ The Act defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”¹¹

10. On March 24, 2010, Sky Angel U.S., LLC (“Sky Angel”), a provider of multiple streams of prescheduled programming over the Internet, filed a complaint and petition for temporary standstill for program access relief, which is available only to MVPDs. On April 21, 2010, the Commission’s Media Bureau denied the petition for standstill, holding that Sky Angel failed to carry its burden of demonstrating that it is likely to succeed in showing on the merits that it is an MVPD entitled to seek relief under the program access rules.¹² The Media Bureau determined that the term “channel” as used in the definition of MVPD appears to include a transmission path as a necessary element.¹³ Based on the limited record at the time, the Bureau was unable to find that Sky Angel provides its subscribers with a transmission path.¹⁴ Sky Angel’s complaint, a second petition for injunctive relief, a motion for sanctions, and discovery requests are pending. In 2012, Sky Angel filed a Petition for Writ of Mandamus with the United States Court of Appeals for the D.C. Circuit, asking the court to require the Commission to adopt and release a final order on the merits of its complaint,¹⁵ and the court denied the Petition “without prejudice to renewal in the event of significant delay.”¹⁶ In March 2012, the Media Bureau issued a Public Notice in connection with the Sky Angel complaint, seeking comment on the most appropriate interpretation of the definition of an MVPD (the “*March 2012 Public Notice*”) to ensure that the Commission has the benefit of broad public input.¹⁷ In June 2014, Sky Angel notified the

¹⁰ 47 U.S.C. § 522(4). The Commission’s regulations define a “television channel” as “a band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies.” 47 C.F.R. § 73.681; *see also* 47 C.F.R. §§ 73.603, 73.606, 73.682(a)(1). The Commission’s regulations also define a “cable television channel” as a “signaling path provided by a cable television system.” 47 C.F.R. § 76.5(r)-(u).

¹¹ 47 U.S.C. § 522(20).

¹² *See Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879, 3882-83, ¶ 7 (MB, 2010) (“*Sky Angel Standstill Denial*”). The procedural background of this case is complex: In March 2010, Sky Angel filed a program access complaint against Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, “Discovery”), as well as a petition for a standstill extending rights it had under its affiliation agreement with Discovery. *See Sky Angel Program Access Complaint*; *Sky Angel U.S., LLC, Emergency Petition for Temporary Standstill*, MB Docket No. 12-80, File No. CSR-8605-P (March 24, 2010). When Sky Angel filed its complaint, it provided a national subscription-based service of approximately eighty channels of video and audio programming including MLB Network, NFL Network, Hallmark Channel, and Weather Channel via a set-top box that has a broadband Internet input and video outputs that connect directly to a television set. *See Sky Angel Complaint* at 1-9. Sky Angel filed its complaint and standstill request with the Commission after receiving notice that Discovery intended to terminate its affiliation agreement with Sky Angel covering certain Discovery networks. The Media Bureau denied the standstill request on the basis that Sky Angel failed to carry its burden of demonstrating that it is likely to succeed in showing on the merits that it is an MVPD entitled to seek relief under the program access rules. *Sky Angel Standstill Denial*, 25 FCC Rcd at 3882-83, ¶ 7. Sky Angel subsequently filed a renewed petition for standstill. *See Sky Angel U.S., LLC, Renewed Petition for Temporary Standstill*, MB Docket No. 12-80 (May 27, 2011).

¹³ *See Sky Angel Standstill Denial*, 25 FCC Rcd at 3882-83, ¶ 7.

¹⁴ *See id.*

¹⁵ *See Sky Angel U.S., LLC, Petition for Writ of Mandamus*, Case No. 12-1119 (filed Feb. 27, 2012).

¹⁶ *Sky Angel U.S., LLC*, Order, Case No. 12-1119 (D.C. Cir. 2012).

¹⁷ *See Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, Public Notice, 27 FCC Rcd 3079 (MB 2012) (“*March 2012 Public Notice*”).

Commission that it had “suspended its video and audio distribution services” in January 2014 because it is unable “to acquire programming in a fair and nondiscriminatory way.”¹⁸

11. More recently, issues have arisen regarding the status of Aereo, Inc., a former provider of online linear video programming, under the Copyright Act and Communications Act. On June 25, 2014, the Supreme Court found that Aereo violated certain copyright holders’ exclusive right to perform their works publicly as provided under the Copyright Act.¹⁹ Aereo then filed with the Copyright Office to pay statutory royalties to retransmit broadcast signals as a cable system. The Copyright Office accepted the filing “on a provisional basis,” pending “further regulatory or judicial developments,”²⁰ including this Commission’s interpretation of the term MVPD and the outcome of the case that was pending before the U.S. District Court for the Southern District of New York.²¹ On November 21, 2014, Aereo filed to reorganize under Chapter 11 of the U.S. Bankruptcy Code.²²

12. Comments filed in response to the *March 2012 Public Notice* reveal a wide range of views.²³ By initiating this rulemaking proceeding, we propose an interpretation that we based on many comments in the record of that proceeding. But we continue to seek broad public input, including discussions with stakeholders, which will fully inform us as we seek to clarify the scope of the definition of MVPD. We note that the Media Bureau recently changed the *ex parte* status of the *March 2012 Public Notice*.²⁴ And today, the Bureau issued a decision holding the *Sky Angel* proceeding in abeyance pending the outcome of this proceeding and terminating the *March 2012 Public Notice* docket. These actions will allow parties to discuss with the Commission the definitional and policy issues raised herein without running afoul of the *ex parte* rules.

III. DISCUSSION

13. As discussed below, we tentatively conclude that the statutory definition of MVPD includes certain Internet-based distributors of video programming.²⁵ Specifically, we propose to interpret the term MVPD to mean all entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time. In reaching this conclusion,

¹⁸ Supplemental Comments of Sky Angel U.S., LLC, MB Docket No. 12-80, File No. CSR-8605-P, at 1 (June 10, 2014).

¹⁹ *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S.Ct. 2498 (2014).

²⁰ Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, U.S. Copyright Office, to Matthew Calabro, Director of Financial Planning & Analysis and Revenue, Aereo, Inc. (July 16, 2014). The letter rejected Aereo’s argument that it is a cable operator under the Copyright Act but indicated that the Copyright Office might revisit that conclusion if the Commission should find Aereo to be an MVPD under the Communications Act. On October 23, 2014, the Federal District Court for the Southern District of New York granted certain broadcast stations’ request for a preliminary injunction to stop Aereo’s live and near-live streaming of their broadcast signals over the Internet. The court appeared to leave open the possibility that Aereo could be entitled to a statutory copyright license if the Copyright Office and this Commission changed our interpretations of our respective statutes. See *American Broadcasting Companies, Inc. et al. v. Aereo, Inc.*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867, at *5, n.3 (SDNY Oct. 23, 2014).

²¹ Eriq Gardner, *Appeals Court Denies Aereo’s Request for New Hearing*, THE HOLLYWOOD REPORTER (Aug. 22, 2014, 6:38 AM), <http://www.hollywoodreporter.com/thr-esq/appeals-court-denies-aereos-request-727009>.

²² See Chet Kanojia, *The Next Chapter*, AEREO BLOG (Nov. 21, 2014), <http://blog.aereo.com/2014/11/next-chapter/>.

²³ Unless otherwise noted, all comments and reply comments discussed and cited herein were filed on May 14, 2012 and June 13, 2012, respectively, in MB Docket No. 12-83.

²⁴ See “Permit But Disclose” *Ex Parte* Procedures Established for Docket Seeking Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding, Public Notice, DA 14-1214 (MB rel. September 30, 2014).

²⁵ See *supra* n.2.

we understand that the market for Internet-based distribution of video programming is nascent and that companies continue to experiment with business models. The current business models include, but are not limited to, the following types of Internet-based video service offerings, including combinations of these offerings:

- **Subscription Linear.** We use this term to refer to Internet-based distributors that make available continuous, linear²⁶ streams of video programming on a subscription basis. This category includes Sky Angel's service as it existed before 2014 and Aereo's service as it existed before the Supreme Court decision.
- **Subscription On-Demand.** We use this term to refer to Internet-based distributors that make video programming available to view on-demand²⁷ on a subscription basis, allowing subscribers to select and watch television programs, movies, and/or other video content whenever they request to view the content without having to pay an additional fee beyond their recurring subscription fee. This category includes Amazon Prime Instant Video, Hulu Plus, and Netflix.²⁸
- **Transactional On-Demand.** We use this term to refer to Internet-based distributors that make video programming available to view on-demand, with consumers charged on a per-episode, per-season, or per-movie basis to rent the content for a specific period of time or to download the content for storage on a hard drive for viewing at any time.²⁹ This category includes Amazon Instant Video, CinemaNow (Best Buy), Google Play, iTunes Store (Apple), Sony Entertainment Network, Vudu (Walmart), and Xbox Video (Microsoft).³⁰
- **Ad-based Linear and On-Demand.** We use this term to refer to Internet-based distributors that make video programming available to view linearly or on demand, with consumers able to select and watch television programs, movies, and/or other video content whenever they request on a free, ad-supported basis. This category includes Crackle, FilmOn, Hulu, Yahoo! Screen, and YouTube as they exist today.

²⁶ In this *NPRM*, we use the terms linear and pre-scheduled interchangeably, consistent with prior Commission use. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 29 FCC Rcd 1597, 1603, ¶ 15, n.23 (2014) ("A linear channel is one that distributes programming at a scheduled time. Non-linear programming, such as video-on-demand ('VOD') and online video content, is available at a time of the viewer's choosing."); *Implementation of Section 304 of the Telecommunications Act of 1996*, Fourth Further Notice of Proposed Rulemaking, 25 FCC Rcd 4303, 4308, ¶ 14 n.43 (2010) ("The term 'linear programming' is generally understood to refer to video programming that is prescheduled by the programming provider. Cf. 47 U.S.C. § 522(12) (defining 'interactive on-demand services' to exclude 'services providing video programming prescheduled by the programming provider').").

²⁷ We use the term "on-demand" to refer to programming that is not prescheduled by the programming provider. See 47 U.S.C. § 522(12) (defining "interactive on-demand service" as "a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider." (emphasis added)).

²⁸ See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Fourteenth Report, 27 FCC Rcd 8610, 8722, ¶ 246, 8725, ¶ 252, 8726, ¶ 254 (2012) ("14th Annual Report").

²⁹ "Electronic sell through" ("EST") services are a subset of "on demand" services that make content available to consumers on a download-to-own basis. See Anytime On Demand, *Media Centre: Glossary of Terms*, http://www.anytimeondemand.com/glossary_of_terms.html#electronic; *Project Concord, Inc. v. NBCUniversal Media, LLC*, Order on Review, DA 12-1958 (Nov. 13, 2012), at ¶ 12 n.55. We use the term Transactional On-Demand to refer to both rental and download-to-own services.

³⁰ See 14th Annual Report, 27 FCC Rcd at 8724, ¶ 249, 8725-26, ¶¶ 253-54, 8727, ¶¶ 256-57.

- **Transactional Linear.** We use this term to refer to non-continuous linear programming that is offered on a transactional basis. This category includes Ultimate Fighting Championship's UFC.TV pay-per-view service.

We invite commenters to identify other categories and examples of Internet-based distributors of video programming not mentioned here.

14. As explained below, we seek comment on our tentative conclusion that entities that provide Subscription Linear video services are MVPDs as that term is defined in the Act because they make multiple channels of video programming available for purchase. We seek comment also on whether any of the other categories of Internet-based distributors of video programming identified above fall within the statutory definition of an MVPD. Because these other Internet-based distributors of video programming either (1) make programming available for free, and not "for purchase" as required by the definition of an MVPD, or (2) do not provide prescheduled programming that is comparable to programming provided by a television broadcast channel,³¹ we believe they fall outside the statutory definition.³² We seek comment on this view.

15. Below, we begin by seeking comment on our proposed interpretation of the definition of the term MVPD and on alternative interpretations.³³ We then seek comment on the public policy ramifications of these alternatives and any other alternatives commenters may suggest. We note that an entity that uses IP to deliver cable service does not alter the classification of its facility as a cable system and does not alter the classification of the entity as a cable operator. Finally, we seek comment on how to treat Internet-based linear video programming services that cable operators and DBS providers may choose to offer in addition to their traditional services.

A. Defining MVPD

16. To qualify as an MVPD under the Communications Act, an entity must "make[] available for purchase, by subscribers or customers, multiple channels of video programming."³⁴ The Commission has previously held that video distributed over the Internet qualifies as "video programming."³⁵ Thus, the key remaining definitional issue is how to interpret the phrase "multiple channels of video programming." We seek comment on this issue as set forth below.

17. The Act defines a "channel" as "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation)."³⁶ As discussed in the Media Bureau's *March 2012*

³¹ See 47 U.S.C. § 522(20) (defining "video programming").

³² 47 U.S.C. § 522(13); see 14th Annual Report, 27 FCC Rcd at 8722, ¶ 246, 8723, ¶ 248.

³³ This *NPRM* does not define or opine on which services or providers are in the same relevant product market as a service designated as an MVPD.

³⁴ 47 U.S.C. § 522(13).

³⁵ The Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). Although the Commission stated a decade ago that "Internet video, called 'streaming video' . . . has not yet achieved television quality . . . and therefore is not consistent with the definition of video programming," it recently reached the opposite conclusion in light of technological developments. *Compare Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4834, ¶ 63 n.236 (2002) with *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17976, ¶ 129 n.408 (2010), *vacated on other grounds*, *Verizon v. FCC*, 740 F.3d 623 (DC Cir 2014) ("intervening improvements in streaming technology and broadband availability enable such programming to be 'comparable to programming provided by . . . a television broadcast station'" (quoting definition of "video programming" in 47 U.S.C. § 522(20))).

³⁶ 47 U.S.C. § 522(4).

Public Notice and in further detail below, there are at least two possible interpretations of the term “channel” within the definition of MVPD.³⁷ We tentatively conclude that the best reading is that “channels of video programming” means streams of linear video programming (the “Linear Programming Interpretation”). Under this interpretation, linear video programming networks, such as ESPN, The Weather Channel, and other sources of video programming that are commonly referred to as television or cable “channels,” would be considered “channels” for purposes of the MVPD definition, regardless of whether the provider also makes available physical transmission paths.³⁸ We also seek comment on an alternative interpretation under which the definition of MVPD would include only entities that make available transmission paths in addition to content, and thus exclude those Internet-based distributors of video programming that do not own or operate facilities for delivering content to consumers (the “Transmission Path Interpretation”).³⁹ We seek comment on which interpretation is most consistent with the text, purpose, legislative history, and structure of the Act and which interpretation best serves Congressional intent. We also invite commenters to identify any other interpretation of MVPD that is consistent with the statute and would better serve Congressional intent. For example, some commenters call for a “functional equivalency” standard, whereby an entity would qualify as an MVPD if it looks and functions like a traditional MVPD from the perspective of consumers; others suggest that Internet-based distributors should be allowed to elect whether or not to avail themselves of MVPD status, taking on both the benefits of such status (such as program access) as well as the regulatory obligations.⁴⁰ To the extent that any commenters favor these or other interpretations, they should explain how their proposed interpretation comports with the statute, how it would be administered or adjudicated in particular cases, and describe the policy ramifications.

1. Proposed “Linear Programming Interpretation”

18. Under our proposed rule, we would interpret the term “channels of video programming” to mean prescheduled streams of video programming (which we refer to in this *NPRM* as “linear” programming), without regard to whether the same entity is also providing the transmission path.⁴¹ We believe that this is the better interpretation for three reasons: (i) it is a reasonable interpretation of the Act and most consistent with Congressional intent, (ii) it best aligns with consumer expectations and industry developments, and (iii) it is consistent with the common meaning of the word channel. We seek comment on the interpretation as set forth below. We seek comment also on our proposal to define “linear video” as a “stream of video programming that is prescheduled by the programmer.”⁴²

19. We tentatively conclude that our proposed Linear Programming Interpretation is consistent with the language of the statute. The statutory definition of MVPD begins by stating that an

³⁷ See *March 2012 Public Notice*, 27 FCC Rcd at 3079, ¶ 1.

³⁸ See *id.*

³⁹ In denying Sky Angel’s standstill request, the Media Bureau expressed tentative approval of the Transmission Path Interpretation. See *Sky Angel Standstill Denial*, 25 FCC Rcd at 3882-83, ¶ 7. In doing so, the Media Bureau cautioned that its action “should not be read to state or imply that the Commission, or the Bureau acting on delegated authority, will ultimately conclude, in resolving the underlying complaint, that Sky Angel does not meet the definition of an MVPD.” *Id.* at 3884, ¶ 10. We also note that staff-level decisions are not binding on the Commission. See *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

⁴⁰ See Sky Angel Comments at 19-20; Comments of Syncbak, Inc. at 3 (“Syncbak Comments”) (calling for a “functional equivalency” standard); see also Reply Comments of M3X Media, Inc. at 3-4 (“M3X Reply Comments”); Reply Comments of Syncbak, Inc. at 6 (“Syncbak Reply Comments”) (suggesting that the Commission should allow entities to choose whether to have MVPD status); see also *infra* ¶¶ 33-64 (discussing the regulatory privileges and obligations of MVPD status).

⁴¹ See Appendix A (proposing new rule section 76.5(ss)).

⁴² See Appendix A (proposing new rule section 76.5(rr)). The Commission has used the word “linear” to refer generally to prescheduled video programming. See *supra* n.26.

MVPD is a “person *such as, but not limited to*, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor”⁴³ In the *Sky Angel Standstill Denial*, the Media Bureau stated that, although the list is preceded by the phrase “not limited to,” making it clear that the list is illustrative rather than exclusive, it is also preceded by the phrase “such as,” which suggests that other covered entities should be “similar” to those listed.⁴⁴ We tentatively conclude that the essential element that binds the illustrative entities listed in the provision is that each makes multiple streams of prescheduled video programming available for purchase, rather than that the entity controls the physical distribution network.⁴⁵ Therefore, we believe that our interpretation is consistent with the illustrative list of MVPDs that the statutory definition provides.

20. In addition, the Commission has previously held that an entity need not own or operate the facilities that it uses to distribute video programming to subscribers in order to qualify as an MVPD.⁴⁶ Rather, an MVPD may use a third party’s distribution facilities in order to make video programming available to subscribers.⁴⁷ We find, therefore, that our proposed interpretation is consistent with Commission precedent. We seek comment on this finding.

21. We also find the term “channel” used in the context of the MVPD definition (*i.e.*, “multiple channels of video programming”) to be ambiguous. Further, we tentatively conclude that Congress did not intend the term “channel” in this context to be interpreted in accordance with the definition in Section 602(4) of the Act,⁴⁸ but rather intended the term to be given its ordinary and common meaning. The Act states that “the term ‘cable channel’ or ‘channel’ means a portion of the electromagnetic frequency spectrum *which is used in a cable system* and which is capable of delivering a

⁴³ 47 U.S.C. § 522(13) (emphasis added).

⁴⁴ *Sky Angel Standstill Denial*, 25 FCC Rcd at 3883, n.41; *see also* ACA Comments at 7-8; Cablevision Comments at 9; Discovery Comments at 4.

⁴⁵ *See* Comments of Public Knowledge at 8-9 (“Public Knowledge Comments”); *see also* ABC/CBS/NBC Affiliates Reply Comments at 4 (“The statute contains no express limitation predicated on the technological *method* by which video programming is delivered to subscribers or customers”) (emphasis in original). Consistent with this interpretation, DIRECTV and SkyAngel note that one of the statutory examples – “a television receive-only satellite program distributor” – does not provide or control the transmission path used to provide video programming to subscribers or customers, thereby supporting our tentative conclusion. *See* DIRECTV Comments at 8-10; Sky Angel Comments at 16-17; *see also* *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5651-52, ¶ 23 (1993) (“TCI asserts that, by including television receive-only satellite programming distributors in the definition of a multichannel video programming distributor, Congress showed that a distributor need not be facilities-based in order to come within the scope of the effective competition test. We agree with TCI that a qualifying distributor need not own its own basic transmission and distribution facilities.”) (“1993 Rate Regulation Order”); ABC/CBS/NBC Affiliates Reply Comments at 7-9; DIRECTV Reply Comments at 3-5; Sky Angel Reply Comments at 15-16. Other commenters dispute DIRECTV and Sky Angel’s assertion that receive-only satellite programming distributors are not facilities based. *See* Cablevision Comments at 8; Comcast/NBCU Reply Comments at 5-6; NCTA Reply Comments at 4-5.

⁴⁶ *See Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301, ¶ 171 (1996) (“[W]e find Rainbow’s argument that video programming providers cannot qualify as MVPDs because they may not operate the vehicle for distribution to be unsupported by the plain language of Section 602(13), which imposes no such requirement.”) (“*OVS Second Order on Recon*”); *see also* 1993 Rate Regulation Order, 8 FCC Rcd at 5651-52, ¶ 23.

⁴⁷ The Commission noted that the effective competition test in Section 623 of the Act suggests that an MVPD can use another entity’s facilities (*e.g.*, that of a local exchange carrier or its affiliate) to provide video programming. *See OVS Second Order on Recon*, 11 FCC Rcd at 20301, ¶ 171; *see also* 47 U.S.C. § 543(1)(1)(D) (referring to video programming provided by “a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate)”).

⁴⁸ 47 U.S.C. § 522(4).

television channel (as television channel is defined by the Commission by regulation).⁴⁹ This definition was adopted in the 1984 Cable Act, which focused primarily on the regulation of cable television.⁵⁰ In contrast, the term "MVPD" was adopted by Congress eight years later in 1992, when new competitors to cable were emerging, and is specifically "not limited" solely to cable operators.⁵¹ Therefore, we tentatively conclude that we should not rely on the cable-specific definition of the term "channel" to interpret the definition of "MVPD," which is explicitly defined to encompass video programming distributors that include, but are not limited to, cable operators.⁵²

22. Moreover, using the cable-specific definition of "channel" to interpret the definition of "MVPD" does not seem consistent with the illustrative list of MVPDs that is included in the definition.⁵³ For example, DBS providers are specifically included in the definition as MVPDs, but the linear streams of video programming that they provide to subscribers do not align with the definition of "channel" in Section 602(4) of the Act, because that definition specifically refers to the electromagnetic spectrum "used in a cable system." If Congress intended an entity to have control over the transmission path in order to be deemed an MVPD, presumably it would have explicitly specified that in the definition of MVPD, as it did with the definition of cable system.⁵⁴ Therefore, we tentatively conclude that, when Congress defined an MVPD as an entity that "makes available . . . channels of video programming," it did not intend to limit the types of entities that meet the definition to only those that control the physical method of delivery (*i.e.*, a transmission path). As a consequence, we believe that this is a reasonable interpretation of the Act. We seek comment on this position.

23. We believe that our proposed interpretation is consistent with Congress's intent to define "MVPD" in a broad and technology-neutral way to ensure that it would not only cover video providers using technologies that existed in 1992, but rather be sufficiently flexible to cover providers using new

⁴⁹ 47 U.S.C. § 522(4) (emphasis added).

⁵⁰ See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779 ("1984 Cable Act"); see also H.R. Rep. No. 98-934 (1984), at 19, reprinted in 1984 U.S.C.C.A.N. 4655, 4656 (stating that the bill "establishes a national policy that clarifies the current system of local, state and federal regulation of cable television").

⁵¹ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2, 106 Stat. 1460 (1992) (adding Section 602(13) to the Act); see also 47 U.S.C. § 522(13) (defining MVPD as a "person *such as, but not limited to*, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor . . .") (emphasis added).

⁵² See Comments of DIRECTV, LLC at 5 ("There is simply no way that the cable-centric definition of 'channel' can be squared with the list of non-cable providers listed in the definition of 'MVPD.'") ("DIRECTV Comments"); see also ABC/CBS/NBC Affiliates Comments at 7-8; AT&T Comments at 5; Comments of Sky Angel U.S., LLC at 20-23 ("Sky Angel Comments").

⁵³ See ABC/CBS/NBC Affiliates Comments at 7; DIRECTV Comments at 5; Sky Angel Comments at 22. We also note Section 336 of the Act, which addresses ancillary broadcast services. 47 U.S.C. § 336. Under that section, the Commission is prohibited from deeming a broadcaster that offers multiple linear streams of video programming for a fee to be an MVPD. 47 U.S.C. § 336(b)(3). This statutory provision would not have been necessary if Congress intended "channel" to mean "a portion of the electromagnetic frequency spectrum . . . which is capable of delivering a television channel" because a broadcast station cannot provide *multiple* portions of the electromagnetic frequency spectrum that are capable of delivering a television channel. Compare 47 U.S.C. § 336(b)(3) with 47 U.S.C. § 602(4) (defining "channel"). Section 336(b)(3) makes sense only if we read "channel" in the definition of multichannel video programming distributor to mean linear stream of video programming.

⁵⁴ Compare 47 U.S.C. § 522(7) (defining a "cable system" as a "facility, consisting of a set of closed transmission paths") with 47 U.S.C. § 522(13) (not referring to "transmission paths" in the definition of "multichannel video programming distributor").

technologies such as Internet delivery.⁵⁵ The Act imposes important pro-consumer responsibilities on MVPDs. As incumbent MVPDs transition to IP delivery, we must ensure that the definition of MVPD is read broadly enough to ensure that consumers do not lose the benefits those provisions are intended to confer. For example, we note that the goals of the program access provision of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”) are to increase competition and diversity in the video programming market, to increase the availability of programming to persons in rural areas, and to spur the development of communications technologies.⁵⁶ It would frustrate those goals to exclude from coverage new technologies and services that develop. Consumers are watching more online subscription video,⁵⁷ and incumbent operators and new entrants alike are experimenting with or planning to launch linear video services over the Internet.⁵⁸ Therefore, we tentatively conclude that the Linear Programming Interpretation is most consistent with consumer expectations and industry trends, and we believe that Congress’s goals are best served by an interpretation of MVPD that accommodates changing technology.⁵⁹ We seek comment on our tentative conclusion that our proposed interpretation is most consistent with consumer expectations and industry trends. To the extent that commenters disagree with our interpretation, they should address why an interpretation of MVPD that focuses on the physical

⁵⁵ See ABC/CBS/NBC Affiliates Comments at 4-5 (“It is well settled, and has been recognized repeatedly and in a variety of contexts, that statutory language is not frozen in time as of its enactment but can and should, consistent with legislative purpose, take account of technological developments.”) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968)). We note that the Commission previously characterized the definition of “MVPD” as “broad in its coverage.” See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd 8055, 8065, ¶ 42 (1992); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 8 FCC Rcd 194, 195, ¶ 6 n.13 (1992).

⁵⁶ See 47 U.S.C. § 548(a) (“The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.”).

⁵⁷ See Deana Myers and Wade Holden, *Online video market remains hot*, SNL KAGAN, June 30, 2014, available at <http://www.snl.com/interactivex/article.aspx?id=28507994&KPLT=2>.

⁵⁸ See, e.g., DishWorld – Watch Live International TV Instantly, <http://www.dishworld.com/> (last visited Oct. 22, 2014); *supra* n.1.

⁵⁹ See AT&T Comments at 5 (“[I]nsofar as Congress intended the 1992 amendments to the Cable Act (including the program access provisions) to promote competition from alternative providers and technologies in the video space, it plainly did not intend to limit the term MVPD to those using a particular technology.”); Sky Angel Comments at 15-16 (“Congress’ intent was to generally increase competition to monopoly cable operators and to spur the development of new communications technologies. And it intended for these goals to be achieved on a ‘technology-neutral basis.’ As such, it would be wholly unreasonable to exclude every service that Congress did not expressly include in the definition.”) (quoting S. Rep. 102-92 (1991), 1992 U.S.C.C.A.N. 1133, 1159 (“Without fair and ready access on a consistent, technology-neutral basis, an independent entity ... cannot sustain itself in the market.”)); *but see infra* ¶ 30 (noting that Conference Report discussing the program access provision of the 1992 Cable Act stated that the “conferees intend that the Commission shall encourage arrangements which promote the development of new technologies *providing facilities-based competition* to cable and extending programming to areas not served by cable”) (emphasis added).

delivery method an entity uses to provide video programming (i) would serve Congress's goals,⁶⁰ (ii) would promote innovation, and (iii) is consistent with the statute.⁶¹

24. Finally, certain commenters suggest that the term "channel" can be interpreted both in the "content" sense and in the "container" sense: "In a video context, the Act uses the term both in a 'container' sense, to refer to a range of frequencies used to transmit programming, and in a 'content' sense to refer to the programming itself, or the programmer."⁶² Those commenters argue that, based on the context, the content sense applies when interpreting the definition of MVPD, "since only that reading is consistent with the Act's pro-competitive purposes."⁶³ We note that the legislative history of the 1992 Cable Act refers to ESPN as a "sports channel" and CNN as a "news channel"; given that both of these are linear programming networks, this suggests that Congress used the term channel, at least in this instance, to refer to such programming networks and not to portions of the electromagnetic frequency spectrum.⁶⁴ Commenters provide numerous examples of the use of the term "channel" in both the content sense (*i.e.*, a linear video programming network) and the container sense (*i.e.*, a range of frequencies used to transmit programming) in everyday usage⁶⁵ and in dictionaries,⁶⁶ as well as by Congress⁶⁷ and the

⁶⁰ See Reply Comments of CBS Corp. at 7 ("The legislative history of the 1992 Cable Act plainly reveals the intent of Congress that broadcasters have the opportunity to consent to - and seek compensation for - the retransmission of their signals by any person or entity, whatever its nature.") ("CBS Reply Comments"); see also ABC/CBS/NBC Affiliates Comments at 15-16; Disney Reply Comments at 5; Fox Reply Comments at 8.

⁶¹ See ACA Comments at 19-20; Discovery Reply Comments at 13 (arguing that policy goals cannot override "the Commission's duty to adhere to the statute.").

⁶² Public Knowledge Comments at 2-3; see Reply Comments of ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates at vi-vii, 19-20, 21-22 ("ABC/CBS/NBC Affiliates Reply Comments").

⁶³ Public Knowledge Comments at 4; see ABC/CBS/NBC Affiliates Reply Comments at vi-vii, 18-20, 21-22. See also DIRECTV Comments at 6 (quoting *Atlantic Cleaners & Dyers, Inc. v. U.S.*, 286 U.S. 427, 433 (1932) and *Environmental Defense Fund v. Duke Energy Corp.*, 549 U.S. 561, 575-76 (2007); Sky Angel Comments at 23-24. But see Cablevision Comments at 6, 12 ("Generally, where a term is defined in a statute, the Commission is not free to ignore that defined term, even when it appears in other provisions of the statute.") (citing *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) and *United States v. Altamirano-Quintero*, 511 F.3d 1087, 1101 (10th Cir. 2007) (explaining that where a term is defined in the statute, "we typically apply the same meaning to the term each time it appears in the statute")); Discovery Comments at 3 ("Although the definition of 'channel' refers only to 'cable systems,' Congress is presumed to have been aware of the definition of 'channel' when it used that term in defining MVPD, and to have used the term deliberately."); NCTA Reply Comments at 2 (noting the "well-established (and Supreme Court-endorsed) canon of statutory construction that '[a]s a rule, '[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated.'") (quoting *Colautti v. Franklin*, 439 U.S. 379, 393 (1979) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978))); see also Comcast/NBCU Reply Comments at 6-8.

⁶⁴ See S. Rep. No. 102-92 (1991), at 24, reprinted in 1992 U.S.C.C.A.N. 1133, 1157 ("[T]here are certain major programmers that are more able to fend for themselves. It is difficult to believe a cable system would not carry the sports channel, ESPN, or the news channel, CNN.") (emphasis added); see also ABC/CBS/NBC Affiliates Comments at 9. But see TWC Comments at 5 (noting that Congress referred to "networks" in the 1992 Cable Act and its legislative history, which it claims undermines the position that Congress would have used the defined term "channel" when it actually intended to refer to a "network.") (citing 47 U.S.C. §§ 534(b)(2)(B), (b)(5), 535(b)(3)(C), (f), 548(c)(3)(B); H.R. Rep. No. 102-628, at 28, 31, 40-41 (1992); S. Rep. No. 102-92 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1144, 1158, 1162, 1168).

⁶⁵ See ABC/CBS/NBC Affiliates Reply Comments at 19-20 ("When a viewer says that her favorite channel is 'Channel 5,' she certainly does not mean that her favorite swath of spectrum is 76 MHz to 82 MHz.") (emphasis in original); DIRECTV Reply Comments at 5 ("MVPDs commonly post a 'Channel Lineup' that lists the programming networks they carry, not the six megahertz of bandwidth into which their systems have been divided. . . . [M]any networks [] call themselves 'Channel,' [such as] 'Discovery Channel.'"); see also Public Knowledge Comments at 11; Sky Angel Reply Comments at 28; but see Cablevision Comments at 13.

Commission.⁶⁸ Because the term “channel” as used in the definition of MVPD is ambiguous, we tentatively conclude that it is reasonable to read the term to have its common, everyday meaning of a stream of prescheduled video programming when we interpret the definition of MVPD. As discussed above, we believe our proposed interpretation is most consistent with the Act’s goals of increased video competition and broadband deployment.⁶⁹ In addition, we believe that it is most consistent with consumer expectations because consumers are focused on the content they receive, rather than the specific method used to deliver it to them.⁷⁰ We seek comment on this tentative conclusion.

25. *Scope of the Linear Programming Interpretation.* We also seek comment on whether, under the Linear Programming Interpretation, we can and should carve out certain types of entities that make available multiple linear streams of video programming from the MVPD definition. If we interpret “multiple channels of video programming” to mean multiple linear streams of video programming, could we, consistent with the statute, narrow the category of entities that would qualify as MVPDs? For example, are there niche online subscription programming providers or other small entities that would not be able to remain in business if they qualify as MVPDs? A “multichannel” video programming distributor is required by definition to make multiple channels of video programming available. We seek comment on how to interpret the term “multiple” in the definition of MVPD.⁷¹ Although we believe it is important to modernize our interpretation of MVPD to capture entities that provide service similar to or competitive with more traditional MVPD service but through new distribution methods, we also wish to ensure that our rules do not impede innovation by imposing regulations on business models that may be better left to develop unfettered by the rules applicable to MVPDs. Should we interpret the term MVPD to require that a certain number of channels of video programming, such as twenty, be made available?⁷² Would twenty channels be too low or too high? Is there justification for a different number? What if an entity makes multiple channels available nationwide, but makes only one channel available for purchase to each subscriber?⁷³ Should we interpret the term “channels of video programming” to require a certain

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⁶⁶ See Public Knowledge Comments at 7 (citing *Oxford English Dictionary*); ABC/CBS/NBC Affiliates Reply Comments at 19-20; but see Cablevision Comments at 13-14 (citing *Merriam-Webster Dictionary* and *American Heritage Dictionary*); Discovery Comments at 7 (citing *Webster’s II New College Dictionary*).

⁶⁷ See Sky Angel Comments at 25-28 (providing 23 references to the legislative history of the 1992 Cable Act in which members of Congress referred to a “channel” as a video programming network); ABC/CBS/NBC Affiliates Comments at 9; ABC/CBS/NBC Affiliates Reply Comments at 20-21; but see Discovery Comments at 7-8 (providing examples from the U.S. Code where the term “channel” refers to a pathway); ACA Comments at 20; TWC Comments at 5.

⁶⁸ See ABC/CBS/NBC Affiliates Comments at 9; DIRECTV Comments at 11; Public Knowledge Comments at 5-7; Sky Angel Comments at 28-31; but see Cablevision Comments at 14-15.

⁶⁹ See *supra* ¶ 23 (discussing how this interpretation would further the 1992 Cable Act’s goal of increased “competition and diversity in the multichannel video programming market”).

⁷⁰ See Michiel Willems, *Co-CEO of thePlatform: “TV Everywhere is the natural evolution” of subscription video*, SNL KAGAN, Sept. 15, 2014, available at <https://www.snk.com/interactivex/article.aspx?id=29204558&KPLT=6> (“We even see a growing interest from operators looking at ways to deliver live linear channels via the cloud in order to support consumer demand across devices.”); *Advanced Television Systems and their Impact upon the Existing Television Broadcast Service*, Sixth Further Notice Of Proposed Rulemaking, 11 FCC Rcd. 10968, 11000 (1996) (suggesting that, to viewers, “the term ‘channel’ implies a single stream of video programming.”).

⁷¹ See Merriam-Webster definition of multiple, <http://www.merriam-webster.com/dictionary/multiple> (defining multiple to mean “more than one” but also “many, manifold”). See also *infra* ¶ 29 (seeking comment on the meaning of “multiple” in the context of the Transmission Path Interpretation).

⁷² See *id.*

⁷³ For example, CBS recently launched an Internet-based linear subscription streaming service that provides subscribers with their local market’s CBS channel. At launch, each subscriber can access a single channel (the channel in the subscriber’s local market); the service launched in 14 different local markets. See Dylan Love, *CBS* (continued....)

number of programming hours per day or per week or to exempt certain niche programmers? Is there justification to require eighteen hours of programming per day, seven days per week, or some other number? We tentatively conclude that an entity that makes linear services available via the Internet is an MVPD, and our regulations apply to all of the MVPD's video services. Are there other factors that we should consider? For example, should we exempt from the interpretation of linear programming discrete, intermittent events that occur at prescheduled times, such as live individual sporting events? While these events are prescheduled by the programming provider, they are presented sporadically, in contrast to most television channels that broadcast continuously throughout the day. If such events are considered linear programming, our proposed Linear Programming Interpretation would appear to apply to online subscription video packages that stream multiple sporting events, such as those offered by Major League Baseball, Major League Soccer, the National Basketball Association, and the National Hockey League.⁷⁴ We seek comment on whether distributors of these types of services should be included within our interpretation of MVPD and, if not, on the statutory basis for excluding them and bright-line tests that we could use to evaluate whether such an exclusion would apply.

26. We tentatively conclude that we should interpret MVPD so that the definition would not apply to a distributor that makes available only programming that it owns—for example, sports leagues or stand-alone program services like CBS's new streaming service.⁷⁵ A potential consequence of the Linear Programming Interpretation would be that a programmer that decides to sell two or more of its own programming networks directly to consumers online, either instead of or in addition to selling them through cable or DBS operators' programming packages, might subject itself to the benefits and burdens of MVPD status. For example, if Disney were to offer, for purchase by subscribers, a package of linear feeds of the Disney Channel, Disney XD, and Disney Junior for online streaming to customers, would that make Disney an MVPD? Would this unduly limit consumer options? Would bringing such an offering into our MVPD regulations discourage innovation? We seek comment on our statutory authority to adopt our tentative conclusion.

27. Under the Act, an entity is an MVPD only if it makes multiple channels of video programming "available for purchase."⁷⁶ We seek comment on what it means to make video programming available for purchase, particularly as that term would apply if we were to adopt our proposed Linear Programming Interpretation. We tentatively conclude that the term means making an offer to consumers to exchange video service for money. We seek comment on this tentative conclusion. Are there other forms of consideration that a consumer could use to purchase services? If a cable or satellite company offers its subscribers access to supplemental online linear video services without a separate charge, but as part of their paid television packages, does this offering constitute making the online services "available for purchase"?⁷⁷ Do any cable or satellite companies charge subscribers for those services indirectly? Is there any way to trace general subscription fees specifically to supplemental online linear video services? We seek comment on how our proposed interpretation could affect new

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On 'All Access': We're Not Disrupting Cable TV; Just Bolstering Local TV Stations, INTERNATIONAL BUSINESS TIMES (Oct. 17, 2014, 2:45PM), <http://www.ibtimes.com/cbs-all-access-were-not-disrupting-cable-tv-just-bolstering-local-tv-stations-1707086> (quoting a CBS executive's description of the service: "We're not launching a national feed, you get your local market's feed.").

⁷⁴ See MLB.tv, <http://mlb.mlb.com/mlb/subscriptions/>; MLS Live, <http://live.mlssoccer.com/mlsmdl/>; What is NBA League Pass?, http://www.nba.com/nba_tv/league_pass.html; NHL GameCenter Live, <https://gamecenter.nhl.com/nhlgc/secure/gclsignup?CMPID=GCL:vnty>.

⁷⁵ See *id.*; CBS All Access FAQ, https://cbsi.secure.force.com/CBSi/knowledgehome_allaccess?referer=cbs.com/vod&categories=CBS_Entertainment%3AAll+Access

⁷⁶ 47 U.S.C. § 522(13).

⁷⁷ See, e.g., Xfinity TV Go, <http://xfinitytv.comcast.net/watch-live-tv/>; Time Warner Cable TWC TV, <https://video2.timewarnercable.com/>; DISH Anywhere, <http://www.dishanywhere.com/>.

business models that do not conform with the traditional monthly subscription model, and whether we should treat those business models on a case-by-case basis.

28. We also seek comment on how our proposed interpretation would apply to entities that are located overseas but make linear video programming networks available for purchase in the United States over the Internet. An entity could meet the definition of MVPD under our proposed definition even if it has no physical presence in the United States.⁷⁸ We tentatively conclude that the Commission should not assert jurisdiction over these entities. If commenters disagree, they should provide the authority under which the Commission could assert jurisdiction. If we assert jurisdiction solely over entities with a physical presence in the United States, will some Internet-based distributors of video programming locate their operations overseas to avoid Commission regulation? Would the alternative interpretation discussed below, which would consider an entity to be an MVPD only if it maintains control over a transmission path, avoid this result by requiring an MVPD to have a jurisdictional presence in the United States?

2. Alternative "Transmission Path Interpretation"

29. We seek comment also on an alternative approach that would interpret the term channel in this context as requiring a transmission path. This is the approach for which the Media Bureau expressed tentative support in denying Sky Angel's standstill request. Citing the statutory definition of "channel" as "*a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel,*"⁷⁹ the Media Bureau expressed the tentative view that the term "channel" as used in the definition of MVPD "appear[s] to include a transmission path as a necessary element."⁸⁰ Under this interpretation, we would not consider Internet-based linear video providers to be MVPDs unless they control at least some portion of the physical means by which the programming is delivered—for example, via a physical cable that the provider owns or via spectrum that the provider is licensed to use. We seek comment on the Transmission Path Interpretation. How would we reconcile the Transmission Path Interpretation with previous Commission decisions that held that an entity need not own or operate the facilities that it uses to distribute video programming to qualify as an MVPD?⁸¹ Would an entity have to make available multiple transmission paths (or, using the language in the definition of "channel," multiple "portions of the electromagnetic frequency spectrum") to each subscriber or customer to qualify as an MVPD? Do all traditional MVPDs make available multiple "portions of the electromagnetic frequency spectrum" to each subscriber or customer, including cable

⁷⁸ See Comcast Comments at 13 n.45; NCTA Reply Comments at 7 (raising the question of how the Commission would enforce rules against foreign entities).

⁷⁹ 47 U.S.C. § 522(4) (emphasis added). The Commission's regulations also define a "cable television channel" as a "signaling path provided by a cable television system." 47 C.F.R. § 76.5(r)-(u).

⁸⁰ *Sky Angel Standstill Denial*, 25 FCC Rcd at 3882-83, ¶ 7. Based on the limited record at the time, the Media Bureau found that Sky Angel did not appear to provide its subscribers with a transmission path; rather, it is the Sky Angel subscriber's Internet service provider that provides the transmission path. See *id.*

⁸¹ See *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301, ¶ 171 (1996) ("[W]e find Rainbow's argument that video programming providers cannot qualify as MVPDs because they may not operate the vehicle for distribution to be unsupported by the plain language of Section 602(13), which imposes no such requirement.") ("*OVS Second Order on Recon*"); see also *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5651-52, ¶ 23 (1993) ("TCI asserts that, by including television receive-only satellite programming distributors in the definition of a multichannel video programming distributor, Congress showed that a distributor need not be facilities-based in order to come within the scope of the effective competition test. We agree with TCI that a qualifying distributor need not own its own basic transmission and distribution facilities.") ("*1993 Rate Regulation Order*").

operators using switched digital video (“SDV”) technology⁸² or an IP-based system in which no unique transmission path is associated with any video programming stream?⁸³ Is there a reasonable basis to believe that Congress intended to regulate as MVPDs only those entities that make available two or more transmission paths to each subscriber or customer, but not those that make available only one transmission path? If we adopt the Transmission Path Interpretation, how can we ensure that our regulations keep up with technology, particularly as incumbent MVPDs transition their services to Internet delivery?

30. We also seek comment on whether Congress intended to promote only facilities-based competition in the video distribution market, which might support the Transmission Path Interpretation. The Conference Report accompanying the 1992 Cable Act includes a statement that Congress intended to promote “facilities-based” competition.⁸⁴ Moreover, the Commission has previously stated that “[f]acilities-based competition” is a term used in the legislative history of the Act to emphasize that program competition can only become possible if alternative facilities to deliver programming to subscribers are first created. The focus in the 1992 Cable Act is on assuring that facilities-based competition develops.⁸⁵ On the other hand, the ABC/CBS/NBC Affiliates note that “there is but one reference to ‘facilities-based competition’ in the lengthy House Report. . . . Certainly, that single reference cannot support the incorporation of a ‘transmission path’ requirement into a statutory definition that does not, on its face, contain any such restriction.”⁸⁶ Accordingly, we seek comment on whether Congress sought to increase facilities-based competition exclusively, or sought to encourage competition to incumbent cable operators more generally, regardless of how the competitive service is delivered.

31. *Scope of the Transmission Path Interpretation.* As we note above, incumbent MVPDs are obtaining rights to distribute content online at a rapid pace and appear prepared to launch online linear video services that are not tied to their facilities.⁸⁷ We seek comment on our regulatory authority under

⁸² SDV is “a method of delivering programming to subscribers only when those subscribers actively request that programming, as opposed to delivering all programming feeds at the same time to all subscribers.” *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Notice of Inquiry, 24 FCC Rcd 750, 764, ¶ 30 (2009); *Carriage of Digital Television Broadcast Signals*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, 21095, ¶ 60 (2007); see also Sky Angel Comments at 22 (claiming that requiring an entity to provide “multiple transmission paths” would exclude cable systems that rely on SDV technology, because these systems “transmit only a single ‘cable channel’ . . . to each home rather than simultaneously transmit ‘multiple channels’ to every subscriber”); Sky Angel Reply Comments at 29 (same).

⁸³ See AT&T Reply Comments at 2-3 (“[I]n an IP-based network/system, such as our own Uverse TV service, which is an MVPD service, there is no unique ‘transmission path’ associated with any particular ‘channel’ or programming stream, or over which programming packets are routed. Rather, the packets of multiple programming streams (or channels) share the same transmission path – often at the same time (such as when multiple viewers in a home are watching different channels at the same time).”).

⁸⁴ See H.R. Rep. No. 102-862 (1992) (Conf. Rep.), at 93, reprinted in 1992 U.S.C.C.A.N. 1231, 1275 (discussing the program access provision of the 1992 Cable Act and stating that the “conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable”).

⁸⁵ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3384, n.79 (1993) (“1993 Program Access Order”).

⁸⁶ ABC/CBS/NBC Affiliates Reply Comments at 10-11 (emphasis in original). See also Sky Angel Reply Comments at 16.

⁸⁷ See *supra* n.1.

the Transmission Path Interpretation in these cases.⁸⁸ The Transmission Path Interpretation seems difficult to apply in certain cases because an entity's status would change depending on how and where the subscriber receives the content. For example, consider a subscriber who views video at her home on a tablet over broadband infrastructure that the video distributor owns, and then visits a local coffee shop and views video on that same tablet via the Internet using broadband infrastructure that the video distributor does not own. In that case, the video provider would be an MVPD at the subscriber's home, but not at the coffee shop. We believe that this would lead to regulatory uncertainty, thus providing more support for the Linear Programming Interpretation. We seek comment on this analysis.

32. We invite comment on any other interpretation the Commission should consider in addition to the Linear Programming Interpretation and the Transmission Path Interpretation.

B. Regulatory Implications of Alternative Interpretations

33. Below, we seek comment on the policy ramifications of the various interpretations set forth above. To the extent possible, we encourage commenters to quantify any costs and benefits and submit supporting data. In addition to the specific effects that we ask about below, we invite commenters to identify other possible effects of the Linear Programming Interpretation and the Transmission Path Interpretation and how those effects should influence our interpretation.

34. We realize that under our proposed Linear Programming Interpretation, several new and planned services may be considered MVPD services. On the one hand, DISH, Sony, and Verizon have each announced linear Internet-based subscription video services whose launch is imminent.⁸⁹ These services reportedly will carry programming from some of the largest content companies in the world.⁹⁰ On the other hand, Aereo, FilmOn, and Sky Angel launched or planned to launch Internet-based subscription video services, but they claim that regulatory uncertainty has limited their ability to develop a subscriber base, limited investment in their services, and hindered their ability to compete.⁹¹ In light of these contrasting examples, we seek comment on whether the privileges and obligations set forth in this section tilt in favor of or against our proposed Linear Programming Interpretation. Would the proposal (i) give innovative companies access to programming that consumers want, or (ii) unduly and unnecessarily burden companies seeking to offer innovative new services?

1. Application of MVPD-Specific Regulatory Privileges and Obligations to Internet-Based Distributors of Video Programming

35. As discussed in further detail below, our proposed interpretation would ensure that incumbent MVPDs do not evade our regulations by migrating their services to the Internet. It would also allow Internet-based distributors of video programming, including those that do not control any facilities,

⁸⁸ We also seek comment below on our tentative conclusion that video programming services that a cable operator may offer over the Internet should not be regulated as cable services, but rather as non-cable MVPD services. See *infra* ¶ 78.

⁸⁹ See *supra* n.1.

⁹⁰ See Lance Whitney, *Sony to launch PlayStation Vue, an online TV service that challenges cable*, CNET (Nov. 13, 2014, 7:02 AM), <http://www.cnet.com/news/sony-to-launch-online-tv-service-to-challenge-cable-tv/>; David Lieberman, *Scripps Networks Agrees To Supply Channels To Dish Network's Planned Streaming Video Service*, DEADLINE (Sept. 16, 2014), <http://deadline.com/2014/09/scripps-networks-offers-channels-dish-streaming-service-834957/>; Chris Welch, *Verizon's internet TV service coming in mid-2015, may let you pick only channels you want*, THE VERGE (Sept. 11, 2014, 11:37 AM), <http://www.theverge.com/2014/9/11/6135737/verizon-internet-tv-coming-mid-2015>.

⁹¹ See Letter from Rebecca Rini, Counsel to FilmOnX, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 12-83, at 2 (Nov. 10, 2014); Letter from Seth D. Greenstein, Counsel to Aereo, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 12-83, at 2-3 (Oct. 10, 2014); Supplemental Comments of Sky Angel U.S. at 1-2, MB Docket No. 12-80 (filed June 10, 2014).

to take advantage of the privileges of MVPD status but would also require them to comply with the legal obligations applicable to MVPDs. Conversely, the Transmission Path Interpretation could allow many if not most Internet-based distributors of video programming to avoid regulation, including obligations that promote important public interest benefits, and would also deprive them of certain regulatory privileges. We seek comment on these policy ramifications below.

a. General Privileges and Obligations

36. An entity that meets the definition of an MVPD is subject to both privileges and legal obligations under the Communications Act and the Commission's rules. The regulatory privileges of MVPD status include the right to seek relief under the program access rules⁹² and the retransmission consent rules.⁹³ Among the regulatory obligations of MVPDs are statutory and regulatory requirements relating to (i) program carriage;⁹⁴ (ii) the competitive availability of navigation devices (including the integration ban);⁹⁵ (iii) good faith negotiation with broadcasters for retransmission consent;⁹⁶ (iv) Equal Employment Opportunity ("EEO");⁹⁷ (v) closed captioning;⁹⁸ (vi) video description;⁹⁹ (vii) access to emergency information;¹⁰⁰ (vi) signal leakage;¹⁰¹ (vii) inside wiring;¹⁰² and (viii) the loudness of commercials.¹⁰³

37. To the extent that an Internet-based distributor of video programming falls within the definition of an MVPD, it will be able to take advantage of the privileges of MVPD status but will also be subject to MVPD obligations, unless the Commission waives some or all of them if authorized to do so. We seek comment on the overall costs and benefits of applying these regulatory privileges and obligations to Internet-based distributors of video programming, including incumbent operators who migrate to Internet delivery. We also seek comment on specific privileges and obligations below. Would waiver or exemption from certain regulations be an appropriate approach for regulating Internet-based distributors? If so, what regulations should be waived or modified to exempt Internet-based distributors, and do we have authority to do so under the Act? Alternatively, does the statute permit us to allow these entities to choose whether they wish to be classified as MVPDs?

⁹² See 47 U.S.C. § 548; 47 C.F.R. §§ 76.1000-1004. Among other things, these rules require cable-affiliated programmers to make their programming available to MVPDs on nondiscriminatory rates, terms, and conditions.

⁹³ See 47 U.S.C. § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65. Among other things, these rules require broadcasters to negotiate in good faith with MVPDs for retransmission consent.

⁹⁴ See 47 U.S.C. § 536; 47 C.F.R. §§ 76.1300-1302.

⁹⁵ See 47 U.S.C. § 549; 47 C.F.R. §§ 76.1200-1210.

⁹⁶ See 47 U.S.C. § 325(b)(3)(C)(iii); 47 C.F.R. § 76.65(b).

⁹⁷ See 47 C.F.R. §§ 76.71-79, 76.1792, 76.1802.

⁹⁸ See 47 C.F.R. § 79.1. We note, however, that video programming delivered via Internet protocol is subject to separate closed captioning obligations under 47 C.F.R. § 79.4.

⁹⁹ See 47 C.F.R. § 79.3.

¹⁰⁰ See 47 C.F.R. § 79.2.

¹⁰¹ See 47 C.F.R. § 76.610; *see also* 47 C.F.R. §§ 76.605(a)(12), 76.611, 76.614, 76.1803; 1.1705(a)(1) (FCC Form 320 – Basic Signal Leakage Performance Report). These rules apply only to the extent that aeronautical frequencies are used.

¹⁰² See 47 C.F.R. §§ 76.800-806. These rules apply only to the extent the MVPD owns inside wiring.

¹⁰³ See Commercial Advertisement Loudness Mitigation ("CALM"), Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. § 621); *see also* 47 C.F.R. § 76.607; *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222 (2011).

38. Would subjecting Internet-based distributors to MVPD regulations deter investment in new technologies and drive some current or prospective Internet-based distributors from the market?¹⁰⁴ On the other hand, would subjecting Internet-based distributors to MVPD regulations provide regulatory certainty that could reassure consumers and spur investment by service providers? To what extent should we consider increasing consumer adoption of non-traditional MVPDs as a factor in regulatory treatment of entities that provide similar services but use different delivery mechanisms?¹⁰⁵ If Internet-based distributors compete with traditional MVPDs,¹⁰⁶ should they be subject to the same regulatory obligations as traditional MVPDs?¹⁰⁷

b. Specific Privileges and Obligations

(i) Privileges

39. Below, we seek comment on the specific privileges of MVPD status and how they would apply to Internet-based distributors of video programming. Would applying the privileges of MVPD status to Internet-based distributors of video programming impose costs on third parties, such as cable-affiliated programmers and broadcasters? To what extent would the public be harmed if these privileges did not extend to Internet-based distributors of video programming?

(a) Program Access

40. As required by Section 628 of the Act, the Commission's program access rules provide certain protections to MVPDs in their efforts to license cable-affiliated programming.¹⁰⁸ These rules: (i) prohibit a cable operator or its affiliated, satellite-delivered programmer from engaging in "unfair methods of competition or unfair or deceptive acts or practices" that have the "purpose or effect" of

¹⁰⁴ See CCIA Comments at 4-5; Open Internet Coalition Comments at 5; Google Reply Comments at 3 n.11 (arguing that imposing MVPD requirements on online video companies will damage the still-developing market for those services); see also MPAA Comments at 3-4; Verizon Comments at 1-2; Comcast/NBCU Reply Comments at 11; Discovery Reply Comments at 3-5; but see Sky Angel Reply Comments at 35-36 (stating that commenters "greatly exaggerate" the burdens of regulations applicable to MVPDs).

¹⁰⁵ See DIRECTV Comments at 15-16 ("[T]he Commission must recognize the rapidly developing capabilities of OVDs and other new-entrant MVPDs which are becoming true competitors to traditional MVPDs. . . . Non-traditional MVPDs have gone from mere curiosities to emerging competitors in a very short period of time, and continue to develop rapidly as the speed and ubiquity of broadband infrastructure improves. In these circumstances, it is appropriate to apply core regulatory rights and responsibilities to both traditional and non-traditional MVPDs."); DIRECTV Reply Comments at 7-8; Reply Comments of the National Association of Broadcasters at 2 ("NAB Reply"); Sky Angel Reply Comments at 34-35.

¹⁰⁶ The Commission has stated that online distributors of video programming "offer a tangible opportunity to bring customers substantial benefits" and that they "can provide and promote more programming choices, viewing flexibility, technological innovation and lower prices." *Comcast Corporation, General Electric Company and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4268-69, ¶ 78 (2011) ("*Comcast/NBCU Order*"). While the Commission concluded that consumers do not perceive online distributors as a substitute for traditional MVPD service, it stated that online distributors are a "potential competitive threat" and that they "must have a similar array of programming" if they are to "fully compete against a traditional MVPD." *Id.* at 4269, ¶ 79, 4272-73, ¶ 86; see also *id.* at 4266, ¶ 70 ("Without access to online content on competitive terms, an MVPD would suffer a distinct competitive disadvantage compared to Comcast, to the detriment of competition and consumers.").

¹⁰⁷ We note that even if an Internet-based distributor qualifies as an MVPD it will not be subject to a number of regulations and statutory requirements applicable to cable and DBS operators unless it also qualifies as one of those services. See, e.g., 47 C.F.R. §§ 76.92, 76.122 (network non-duplication rules, which apply to cable operators); 47 U.S.C. §§ 338, 534, 535 (carry-one, carry-all and must carry requirements, which apply to DBS and cable operators, respectively); 47 U.S.C. § 315, 335(a), 47 C.F.R. §§ 76.205-206, 76.1611, 76.1701; 47 C.F.R. § 25.701(b)-(d) (political programming and candidate access obligations for DBS and cable operators).

¹⁰⁸ See 47 U.S.C. § 548.

“hinder[ing] significantly or prevent[ing]” an MVPD from providing programming to subscribers or consumers (the “unfair act” prohibition);¹⁰⁹ (ii) prohibit a cable operator from unduly or improperly influencing the decision of its affiliated, satellite-delivered programmer to sell, or unduly or improperly influencing the programmer’s prices, terms, and conditions for the sale of, satellite-delivered programming to any unaffiliated MVPD (the “undue or improper influence” rule);¹¹⁰ and (iii) prohibit a cable-affiliated, satellite-delivered programmer from discriminating in the prices, terms, and conditions of sale or delivery of satellite-delivered programming among or between competing MVPDs (the “non-discrimination” rule).¹¹¹ To the extent that an MVPD believes that a cable-affiliated programmer has violated these rules, it may file a complaint with the Commission.¹¹²

41. If the program access rules were to apply, would cable-affiliated programmers be required to negotiate with and license programming to potentially large numbers of Internet-based distributors?¹¹³ How will this impact the value of cable-affiliated programming to traditional MVPDs, especially as compared to non-cable-affiliated programming?¹¹⁴ To the extent that licensing programming to a particular Internet-based distributor presents reasonable concerns about signal security and piracy, do the program access rules adequately address this issue by recognizing these concerns as a legitimate reason for a cable-affiliated programmer to withhold programming from an MVPD?¹¹⁵ Would extending the reach of the program access rules have a positive effect for consumers?

¹⁰⁹ See 47 U.S.C. § 548(b); 47 C.F.R. § 76.1001(a); *Revision of the Commission’s Program Access Rules*, Report and Order, 27 FCC Rcd 12605, 12640-45, ¶¶ 52-58 (2012) (“2012 Program Access Order”) (explaining the process for challenging exclusive contracts involving satellite-delivered, cable-affiliated programming pursuant to the unfair act prohibition); *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010) (“2010 Program Access Order”), *affirmed in part and vacated in part sub nom. Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) (“*Cablevision II*”) (establishing procedures for challenging allegedly unfair acts involving terrestrially delivered, cable-affiliated programming pursuant to the unfair act prohibition).

¹¹⁰ See 47 U.S.C. § 548(c)(2)(A); 47 C.F.R. § 76.1002(a).

¹¹¹ See 47 U.S.C. § 548(c)(2)(B); 47 C.F.R. § 76.1002(b).

¹¹² See 47 U.S.C. § 548(d); 47 C.F.R. § 76.1003.

¹¹³ See Comcast Comments at 11-12 (arguing that thousands of entities would make program access claims); NCTA Reply Comments at 6-7; *but see* DIRECTV Comments at 13; DIRECTV Reply Comments at 8; Sky Angel Reply Comments at 11-12 (asserting that few companies would qualify as MVPDs).

¹¹⁴ See Discovery Comments at 13 (“Negotiated license fees between MVPDs and programmers today are based in part on an MVPD’s expectation of whether the availability of a network is likely to induce subscribers to use the MVPD’s services. While nearly every MVPD today faces competition from several other distributors, the number and popularity of those distributors is fairly easily identified and factored into the price as necessary. If the same programming network is available through an unknown and unlimited number of online sources, that network’s value to the facilities-based MVPD may be diminished, as may be the price the MVPD is willing to pay for it.”); Discovery Reply Comments at 5-7; Ovation Reply Comments at 4.

¹¹⁵ See *Cellularvision of New York, L.P. v. Sportschannel Associates*, Order on Reconsideration, 11 FCC Rcd 3001, 3003, ¶ 11 (Cable Servs. Bur., 1996) (“While the program access provisions clearly allow programmers to refuse to provide programming for a legitimate business reason, such as concerns about signal security, the Commission cannot simply defer to a programmer’s assessment of whether its concerns are reasonable.”); *see also* 47 U.S.C. § 548(c)(2)(B)(i) (providing that the program access rule prohibiting discrimination does not preclude a cable-affiliated programmer from “imposing reasonable . . . standards regarding . . . technical quality”); 47 C.F.R. § 76.1002(b)(1) (same). We also note that the statute provides permissible factors for programmers to consider when they set rates for programming. See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3364, ¶ 14 (1993) (“[W]e will find price discrimination to have occurred if the difference in the price charged to competing distributors is not explained by the statute’s permissible factors. In general terms, these factors involve (1) cost differences at the wholesale level in

(continued....)

42. We also seek comment on whether and how our proposed rule and alternative interpretations would impact competition in the video distribution market (both at present and in the future), specifically with respect to the program access rules.¹¹⁶ Among other things, the program access rules are intended to prevent cable-affiliated programmers from discriminating among similarly situated MVPDs.¹¹⁷ If Internet-based distributors of video programming are deemed not to be MVPDs because they do not make available transmission paths (and therefore are ineligible for the benefits of the program access rules), would there be any regulatory or other constraint that would prevent a cable-affiliated programmer from making its affiliated programming available for online distribution to only certain Internet-based distributors of video programming, such as those owned by its affiliated cable operator, but not to those owned by other MVPDs?¹¹⁸ In such a scenario, because the cable-affiliated programmer would not be differentiating among "MVPDs," would different treatment be permissible under the program access rules? How would this impact competition in the video distribution market? Cablevision contends that extending the program access rules to Internet-based distributors would give them too much flexibility compared to existing MVPD competitors.¹¹⁹ Is this a concern that we should consider, and if so, why? We note that the Commission receives few program access complaints; should this affect our analysis? Or does it reflect that programmers are following our program access rules and they are working?

(b) Retransmission Consent

43. Section 325(b) of the Act benefits MVPDs by requiring broadcasters to negotiate in good faith with MVPDs for retransmission consent¹²⁰ and prohibiting broadcasters from negotiating exclusive retransmission consent agreements with any MVPD.¹²¹ Absent these provisions, broadcasters could potentially refuse to negotiate with and thereby withhold their signals from MVPDs that wish to carry

(Continued from previous page) _____

providing a program service to different distributors; (2) volume differences; (3) differences in creditworthiness, financial stability, or character; and (4) differences in the way the service is offered.").

¹¹⁶ See *supra* n.106 (discussing Internet-based distributors as a potential competitive threat to traditional MVPDs); see also Comments of the Writers Guild of America, West, Inc. at 4 ("Without including these new entities within the MVPD definition, vertically integrated MVPDs such as DirecTV, Comcast and Cablevision could opt to withhold their programming from new competitors.") ("WGA-West Comments"); Sky Angel Comments at 36-39.

¹¹⁷ See 47 U.S.C. § 548(c)(2)(B) (requiring the Commission to adopt regulations that "prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups . . .").

¹¹⁸ We seek comment below on whether networks have the rights to license this programming for online distribution at all. See *infra* ¶¶ 67-69.

¹¹⁹ See Cablevision Comments at 2 (arguing that "cable operators, saddled with legacy rules and business practices, could find [it] difficult to match" services offered by Internet-based services). But see Reply Comments of Public Knowledge at 9 ("online MVPDs will have capital and content costs like any others"); DIRECTV Comments at 13-14.

¹²⁰ See 47 U.S.C. § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65. This provision also imposes a reciprocal obligation on MVPDs to negotiate in good faith with broadcasters for retransmission consent. See 47 U.S.C. § 325(b)(3)(C)(iii); 47 C.F.R. § 76.65. We discuss this obligation below. See *infra* ¶¶ 50-53.

¹²¹ See 47 U.S.C. § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65(l).

these signals.¹²² To the extent that an MVPD believes that a broadcaster has violated these provisions, it may file a complaint with the Commission.¹²³

44. We seek comment on the impact that our proposed interpretation of the definition of MVPD and alternative interpretations would have on the retransmission consent process.¹²⁴ Under our proposal, would the retransmission consent rules force broadcasters to negotiate with and license their signals to potentially large numbers of Internet-based distributors?¹²⁵ We seek comment also on whether and how competition in the video distribution market (both at present and in the future) would be impacted if Internet-based distributors of video programming are not considered MVPDs and therefore are not able to benefit from the retransmission consent rules.¹²⁶

45. Section 325(b)(1)(A) of the Act provides that “no cable system or other *multichannel video programming distributor*” shall retransmit a broadcast signal without the broadcaster’s consent.¹²⁷ But an entity wishing to retransmit a broadcast signal also must obtain authorization to publicly perform the copyrighted works within the broadcast signal.¹²⁸ If we adopt the Linear Programming Interpretation and the Copyright Office does not afford statutory licenses to Internet-based video providers, how would we construe a broadcaster’s obligation to negotiate in good faith? What effect should the answer to that question have on our policy analysis?¹²⁹

(ii) Obligations

46. Below, we seek comment on specific obligations imposed on MVPDs and how those obligations would apply to Internet-based distributors of video programming. How costly would it be for Internet-based distributors of video programming to comply with these regulations? Would the public be harmed if these obligations did not extend to Internet-based distributors of video programming and such distribution became prevalent?

47. The interpretation of MVPD that we ultimately adopt in this proceeding may subject certain Internet-based distributors of video programming to Commission regulation that are not currently subject to such regulation. What transition period should we allow these entities to come into compliance with each of the relevant rules?

(a) Program Carriage

48. The program carriage rules prohibit MVPDs from (i) requiring a financial interest in a video programming vendor’s program service as a condition for carriage;¹³⁰ (ii) coercing a video

¹²² Section 325(b)(1)(A) of the Act provides that “No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except— (A) with the express authority of the originating station . . .” 47 U.S.C. § 325(b)(1)(A).

¹²³ See 47 C.F.R. § 76.65(c).

¹²⁴ We seek comment below on how the interpretation of the definition of the MVPD will impact the statutory copyright licenses. See *infra* ¶ 66.

¹²⁵ See Comcast Comments at 11-12 (“If OVDs were deemed MVPDs . . . broadcasters potentially would face the prospect of having to negotiate retransmission consent agreements – and the duty to bargain in good faith – with thousands of OVDs. . . . [T]here are bound to be disputes that will lead to complaints at the Commission, undermining ongoing marketplace negotiations and burdening Commission staff and resources.”).

¹²⁶ See *supra* n.106 (discussing Internet-based distributors as a potential competitive threat to traditional MVPDs).

¹²⁷ 47 U.S.C. § 325(b)(1)(A) (emphasis added); see also 47 C.F.R. § 76.64.

¹²⁸ 17 U.S.C. §§ 106, 111; *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S.Ct. 2498, 2507 (2014).

¹²⁹ See also *infra* ¶ 66.

¹³⁰ See 47 C.F.R. § 76.1301(a); see also 47 U.S.C. § 536(a)(1).

programming vendor to provide, or retaliating against a vendor for failing to provide, exclusive rights as a condition of carriage;¹³¹ or (iii) unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage.¹³² To the extent that a programming vendor believes that an MVPD is not in compliance with these rules, it may file a complaint with the Commission.¹³³

49. What practical impact, if any, would these rules have on Internet-based distributors of video programming?¹³⁴ As we note above, large, established cable operators, DBS providers, and technology companies have announced plans to launch Internet-based video programming services that would be MVPD services under the Linear Programming Interpretation.¹³⁵ If these companies follow through with these plans, absent application of the program carriage rules there may be no regulatory constraint preventing them from demanding a financial interest or exclusive rights from programmers as a condition for carriage.¹³⁶ Does this argue in favor of adopting an interpretation of MVPD that would cover providers of these services under the program carriage rules? Moreover, as more Internet-based distributors invest in their own programming, they may have an incentive to favor their affiliated programming over unaffiliated programming on the basis of affiliation.¹³⁷ We seek comment on the effect that the alternative interpretations will have on negotiations with programmers and Internet-based video programming services. What are the costs and benefits of applying the program carriage obligations to Internet-based video programming services?

(b) Retransmission Consent

50. As discussed above, Section 325(b)(1)(A) of the Act provides that “No cable system or other *multichannel video programming distributor* shall retransmit the signal of a broadcasting station, or any part thereof, except— (A) with the express authority of the originating station”¹³⁸ Thus, to the extent that an Internet-based distributor of video programming qualifies as an MVPD, it must receive the consent of the broadcaster before retransmitting the broadcaster’s signal. Moreover, Section 325(b) of the Act imposes an obligation on MVPDs to negotiate in good faith with broadcasters in obtaining retransmission consent.¹³⁹ If a broadcaster believes that an MVPD has violated these provisions, it may file a complaint with the Commission.¹⁴⁰

¹³¹ See 47 C.F.R. § 76.1301(b); see also 47 U.S.C. § 536(a)(2).

¹³² See 47 C.F.R. § 76.1301(c); see also 47 U.S.C. § 536(a)(3).

¹³³ See 47 U.S.C. § 536(a)(4); see also 47 C.F.R. § 76.1302.

¹³⁴ See Sky Angel Reply Comments at 35 (“The program carriage rules would have little, if any effect, because they do not mandate carriage.”).

¹³⁵ See *supra* n.1 (citing press reports that Sony, Dish Network, DIRECTV and Verizon each plan to launch online linear video services).

¹³⁶ See 47 C.F.R. § 76.1301(a)-(b); see also 47 U.S.C. § 536(a)(1)-(2).

¹³⁷ See Neil Irwin, *Netflix vs. Amazon, and the New Economics of Television*, THE NEW YORK TIMES, April 25, 2014, available at <http://www.nytimes.com/2014/04/27/upshot/netflix-vs-amazon-and-the-new-economics-of-television.html?abt=0002&abg=0>; 47 C.F.R. § 76.1301(c); see also 47 U.S.C. § 536(a)(3).

¹³⁸ 47 U.S.C. § 325(b)(1)(A) (emphasis added); see also 47 C.F.R. § 76.64.

¹³⁹ See 47 U.S.C. § 325(b)(3)(C)(iii); 47 C.F.R. § 76.65. This provision also imposes a reciprocal obligation on broadcasters to negotiate in good faith with MVPDs for retransmission consent. See 47 U.S.C. § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65. We discuss this obligation in greater detail above. See *supra* ¶¶ 43-45.

¹⁴⁰ See 47 C.F.R. § 76.65(c).

51. We seek comment above on how the retransmission consent rules can benefit MVPDs, as we propose to interpret that term. We now seek comment on the practical impact the obligations of MVPDs under the retransmission consent rules would have on Internet-based distributors of video programming that qualify as MVPDs. What impact will the obligation to negotiate in good faith with broadcasters have on the resources of Internet-based distributors of video programming that qualify as MVPDs? In particular, will Internet-based distributors of video programming that operate on a nationwide basis have to engage in negotiations with thousands of broadcasters throughout the nation?

52. Are some Internet-based distributors of video programming likely to prefer not to carry broadcast signals? For example, to the extent that an Internet-based provider provides service nationwide it may prefer not to offer local content. In that case, would the good faith negotiation requirements allow these distributors to simply reject all carriage terms offered by a broadcaster and to refrain from making any carriage offers of their own? Or, would this conduct amount to a violation of the duty to negotiate in good faith?¹⁴¹ Would it matter whether the distributor declined to negotiate with any broadcast stations? How will the answers to these questions impact the business models of Internet-based distributors of video programming that qualify as MVPDs but would prefer not to carry broadcast signals? Is it likely or possible that Internet-based distributors will want to carry broadcast *network* programming, or to carry broadcast stations nationwide?

53. How do network affiliation agreements impact the carriage of broadcast stations on Internet-based MVPDs? Specifically, to what extent do existing network affiliation agreements limit or prohibit local network stations' ability to grant retransmission consent rights to Internet-based MVPDs?¹⁴² Would limiting or prohibiting these provisions harm localism?

(c) Other MVPD Obligations

54. *Closed Captioning.* Section 79.1 of the Commission's rules (the "television closed captioning rules") requires MVPDs¹⁴³ to provide closed captioning, defined as the "visual display of the audio portion of video programming pursuant to the technical specifications set forth in this part."¹⁴⁴ Internet video services are not subject to these requirements.¹⁴⁵ Internet-based distributors of video

¹⁴¹ See 47 C.F.R. § 76.65(b)(1)(i) (providing that the refusal by a Negotiating Entity (defined to include an MVPD) to negotiate retransmission consent violates the Negotiating Entity's duty to negotiate in good faith); 47 C.F.R. § 76.65(b)(1)(iv) (providing that the refusal by a Negotiating Entity (defined to include an MVPD) to put forth more than a single, unilateral proposal violates the Negotiating Entity's duty to negotiate in good faith); *but see* 47 C.F.R. § 76.65(a)(2) ("If a television broadcast station or multichannel video programming distributor negotiates in accordance with the rules and procedures set forth in this section, failure to reach an agreement is not an indication of a failure to negotiate in good faith."); *2005 Reciprocal Bargaining Order*, 20 FCC Rcd at 10345, ¶ 14 ("[P]rovided that a party to a reciprocal bargaining negotiation complies with the requirements of the Commission's rules, failure to reach agreement would not violate either Section 325(b)(3)(C) or Section 76.65 of the Commission's rules. Accordingly, NCTA's argument that the reciprocal bargaining obligation will lead to another form of must carry is incorrect."); Sky Angel Reply Comments at 35 (claiming that the "retransmission consent rules do not mandate carriage, but rather simply require MVPDs to act in good faith while ensuring that broadcasters are adequately compensated for the retransmission of their signals").

¹⁴² For example, do any network affiliation agreements prohibit a local network-affiliated station from permitting the retransmission of the entirety of its signal over the Internet? Do they limit the retransmission of network programming over the Internet?

¹⁴³ See 47 C.F.R. § 79.1(a)(2).

¹⁴⁴ 47 C.F.R. § 79.1(a)(4); *see also* 47 U.S.C. § 613.

¹⁴⁵ *Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd 3272, 3385, ¶¶ 249-51 (1997) ("[W]e recognize that there are issues that need to be addressed relating to the convergence of television receivers and computers and the growth of Internet video like programming that may need to be addressed in the future. . . . [W]e believe that further study of these issues relating to new technologies and captioning is needed."); *Implementation of the Child Safe Viewing Act*, Report, 24 FCC Rcd 11413, 11478, ¶ 149 (2009).

programming, however, are subject to the Commission's Internet protocol ("IP") closed captioning requirements set forth in Section 79.4 of the Commission's rules (the "IP closed captioning rules") to the extent that they make video programming available directly to end users through a distribution method that uses IP.¹⁴⁶ The IP closed captioning rules are narrower than the television closed captioning rules, insofar as the IP closed-captioning rules require closed captioning of IP-delivered video programming only if the programming is published or exhibited on television with captions,¹⁴⁷ whereas the television closed captioning rules require closed captioning for all new nonexempt English- and Spanish-language video programming.¹⁴⁸ The Commission has explained that the "IP closed captioning rules do not apply to traditional managed video services that MVPDs provide to their MVPD customers within their service footprint, regardless of the transmission protocol used; rather, such services are already subject to Section 79.1 of the Commission's rules."¹⁴⁹ To the extent that some Internet-based distributors of video programming qualify as MVPDs, how will this impact their obligations with respect to closed captioning?¹⁵⁰ Will they be subject to Section 79.1 or 79.4 of the Commission's rules, or will the Commission need to develop another set of requirements tailored to these services?¹⁵¹ Will we need to amend our closed captioning rules if we adopt the Linear Programming Interpretation, and if so, how?

55. *Video Description.* As required by the CVAA,¹⁵² the Commission's rules require MVPD systems that serve 50,000 or more subscribers to provide 50 hours per quarter of video description, which makes video programming accessible to people who are blind or visually impaired,¹⁵³ on each of the five most popular nonbroadcast networks.¹⁵⁴ In general, MVPDs of any size must pass through any video

¹⁴⁶ See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787 (2012) ("IP Closed Captioning Order"); see also 47 U.S.C. § 613(c); 47 C.F.R. § 79.4(a)(3).

¹⁴⁷ See 47 U.S.C. § 613(c)(2)(A); see also 47 C.F.R. § 79.4(b); *IP Closed Captioning Order*, 27 FCC Rcd at 804-05, ¶ 25 (the IP closed captioning requirement "is triggered only after the programming has been shown on television with closed captions").

¹⁴⁸ See 47 C.F.R. § 79.1(b); *IP Closed Captioning Order*, 27 FCC Rcd at 795-96, ¶ 11. See 47 C.F.R. § 79.1(b); *IP Closed Captioning Order*, 27 FCC Rcd at 795-96, ¶ 11. "New" programming refers to analog video programming first published or exhibited on or after January 1, 1998, or digital video programming first published or exhibited on or after July 1, 2002. 47 C.F.R. §§ 79.1(a)(5). The Commission's television closed captioning rules also require closed captioning of 75% of a programming distributor's pre-rule, nonexempt English and Spanish language programming that is distributed and exhibited on each channel during each calendar quarter. 47 C.F.R. §§ 79.1(b)(2)(ii), (b)(4)(ii). "Pre-rule" programming refers to analog video programming first published or exhibited before January 1, 1998, or digital video programming first published or exhibited before July 1, 2002. 47 C.F.R. § 79.1(a)(8). See 47 C.F.R. § 79.1(b); *IP Closed Captioning Order*, 27 FCC Rcd at 795-96, ¶ 11.

¹⁴⁹ See *IP Closed Captioning Order*, 27 FCC Rcd at 795-96, ¶ 11.

¹⁵⁰ Because the Commission to date has not determined the extent to which Internet-based distributors of video programming qualify as MVPDs (and thus would be covered by the television closed captioning rules), we expect that Internet-based distributors of video programming are currently complying with at least the IP closed captioning rules.

¹⁵¹ See *IP Closed Captioning Order*, 27 FCC Rcd at 795-96, ¶ 11.

¹⁵² See Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, Title II, § 202(a), 124 Stat. 2751, 2767-70 (2010) (codified at 47 U.S.C. § 613(f)) ("CVAA"); see also 47 C.F.R. § 79.3; *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847 (2011) ("Video Description Order").

¹⁵³ Video description is defined as "the insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue." 47 U.S.C. § 613(h)(1); 47 C.F.R. § 79.3(a)(3).

¹⁵⁴ 47 C.F.R. § 79.3(b)(4). The top five national nonbroadcast networks for the purposes of these rules are USA, the Disney Channel, TNT, Nickelodeon, and TBS. See *Video Description Order*, 26 FCC Rcd at 11854, ¶ 13. This list will be updated on July 1, 2015 and at three-year intervals. See *id.* at 11857, ¶ 18; see also 47 C.F.R. § 79.3(b)(4).

description provided with programming they carry, including broadcast channels, as long as they have the technical capability to do so.¹⁵⁵ Section 79.105 of the Commission's rules requires apparatus designed to receive or play back video programming to decode and make available the secondary audio stream, if technically feasible, to facilitate the transmission and delivery of video description.¹⁵⁶ We seek comment on the costs as well as the practical impact these obligations will have on an Internet-based distributor of video programming that qualifies as an MVPD.¹⁵⁷ Are there attributes of Internet-based distributors of video programming that make compliance with these requirements more burdensome than for traditional MVPDs?¹⁵⁸ We also seek comment on our authority to extend our video description regulations to Internet-delivered MVPDs under the Linear Programming Interpretation.¹⁵⁹ Will we need to amend our video description rules if we adopt the Linear Programming Interpretation, and if so, how?

56. *Accessibility of Emergency Information.* Section 79.2 of the Commission's rules requires MVPDs to comply with certain requirements pertaining to the accessibility of emergency information by persons with disabilities.¹⁶⁰ And to make emergency information accessible to individuals who are blind or visually impaired, Section 79.105 of the Commission's rules requires apparatus designed to receive or play back video programming to decode and make available the secondary audio stream, if technically feasible.¹⁶¹ We seek comment on the costs as well as the practical impact these obligations will have on Internet-based distributors of video programming that qualify as MVPDs.¹⁶² Will we need to amend our emergency information accessibility rules if we adopt the Linear Programming Interpretation, and if so, how?

57. *Accessible User Interfaces, Guides, and Menus.* Section 79.108 of the Commission's rules requires MVPDs to "ensure that the on-screen text menus and guides provided by navigation devices for the display or selection of multichannel video programming are audibly accessible in real time upon request by individuals who are blind or visually impaired."¹⁶³ We seek comment on the costs and the practical impact these obligations will have on Internet-based distributors of video programming that

¹⁵⁵ 47 C.F.R. § 79.3(b)(5).

¹⁵⁶ 47 C.F.R. § 79.105.

¹⁵⁷ See Sky Angel Reply Comments at 36 (claiming that the video description rules are not burdensome because they "apply only to large MVPDs, and only with respect to the top-five non-broadcast networks" and because they "only require fifty hours of described programming per calendar quarter, and these descriptions likely will be provided by programmers, not MVPDs"). As noted above, all MVPDs, not just large ones, have certain pass-through obligations.

¹⁵⁸ In another proceeding arising under the CVAA, the Commission is considering whether MVPDs must comply with video description obligations when they allow subscribers to access linear programming on tablets, laptops, personal computers, smartphones, or similar devices. See *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation Of The Twenty-First Century Communications And Video Accessibility Act Of 2010*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 4871, 4927-28, ¶¶ 83-84 (2013) ("Video Description Further Notice").

¹⁵⁹ See *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report, 29 FCC Rcd 8011, 8012, n.2 (MB 2014) ("Video programming delivered using [IP] includes, but is not limited to, video programming that is available on the Internet . . . To the extent a multichannel video programming distributor [MVPD] uses IP to distribute its traditional managed video services to its MVPD customers within its service footprint, however, that service is subject to the existing video description rules that apply to MVPDs, notwithstanding the use of IP technology.").

¹⁶⁰ See 47 C.F.R. § 79.2.

¹⁶¹ See 47 C.F.R. § 79.105.

¹⁶² The Commission is also considering this issue in the *Video Description Further Notice*. 28 FCC Rcd at 4926-4928, ¶¶ 80-84.

¹⁶³ 47 C.F.R. § 79.108.

qualify as MVPDs, particularly in light of the fact that digital apparatus (aside from navigation devices) that are designed to receive digital video (including IP video) must be accessible to and useable by individuals who are blind or visually impaired.¹⁶⁴ Will we need to amend our user interface accessibility rules if we adopt the Linear Programming Interpretation, and if so, how?

58. *Equal Employment Opportunities ("EEO")*. The Commission's EEO rules apply to MVPDs.¹⁶⁵ In general terms, these rules (i) require MVPDs to provide equal opportunity in employment to all qualified persons and prohibit MVPDs from discriminating in employment based on race, color, religion, national origin, age, or sex;¹⁶⁶ (ii) require MVPDs to engage in certain outreach and recruitment activities;¹⁶⁷ and (iii) require MVPDs to comply with certain reporting and recordkeeping requirements.¹⁶⁸ We seek comment on the practical impact these obligations will have on Internet-based distributors of video programming that qualify as MVPDs. Do Internet-based distributors of video programming currently meet some or all of these requirements?¹⁶⁹ Will we need to amend our EEO rules if we adopt the Linear Programming Interpretation, and if so, how?

59. *Navigation Devices*. Section 629 of the Act directs the Commission to adopt regulations to assure the commercial availability of navigation devices used by consumers to access services from MVPDs.¹⁷⁰ The Commission has adopted several regulations that allow consumers to attach non-harmful devices to MVPD networks, require MVPDs to offer separate conditional access elements if they use navigation devices to perform conditional access functions, and prohibit MVPDs from using integrated conditional access in the devices that they lease or sell to their consumers.¹⁷¹ We seek comment on the practical impact as well as the costs these obligations will have on Internet-based distributors of video programming that qualify as MVPDs. To what extent do Internet-based distributors of video programming use navigation devices in the provision of their video programming service? If they do use such devices, do they currently meet these requirements? What devices do they use to provide programming to subscribers? Sky Angel, for example, states that its service cannot be viewed without its "proprietary set-top box, which Sky Angel directly and remotely controls at all times for purposes ranging from periodic service and software updates to service activation or termination."¹⁷² Do Internet-based distributors meet the requirements for an exemption from the integration ban?¹⁷³ Are there aspects of Internet-based video services that make compliance with these requirements more burdensome than for traditional MVPDs? Will we need to amend our navigation device rules if we adopt the Linear Programming Interpretation, and if so, how?

¹⁶⁴ 47 C.F.R. § 79.107.

¹⁶⁵ See 47 U.S.C. § 554(h); 47 C.F.R. § 76.71(a); see also 47 C.F.R. § 25.601 (extending EEO obligations to DBS).

¹⁶⁶ See 47 U.S.C. § 554(b); 47 C.F.R. § 76.73(a); see also 47 U.S.C. § 554(c); 47 C.F.R. § 76.73(b).

¹⁶⁷ See 47 C.F.R. § 76.75(a)-(b), (e).

¹⁶⁸ See 47 C.F.R. §§ 76.75(c); 76.77(a), (d); 76.1702; 76.1802.

¹⁶⁹ Sky Angel claims that the Commission's EEO requirements "are not oppressive, and in fact are less burdensome than many states' generally applicable EEO laws." Sky Angel Reply Comments at 36.

¹⁷⁰ See 47 U.S.C. § 549; 47 C.F.R. §§ 76.1200-1210.

¹⁷¹ See 47 C.F.R. §§ 76.1201-76.1204

¹⁷² Sky Angel Comments at 19.

¹⁷³ See Sky Angel Reply Comments at 36 (claiming that, "although the navigation device requirement 'nominally applies to all MVPDs,' the Commission 'has applied its rules only to cable operators'"). Despite Sky Angel's claim, MVPDs are exempt from the integration ban if they support navigation devices that "operate throughout the continental United States" and are available from retail sources that are not affiliated with the MVPD. 47 C.F.R. § 76.1204(a)(2)(ii). Many of the requirements in Sections 76.1200-76.1210 apply to MVPDs, and MVPDs that disregard those rules are subject to enforcement.

60. *Signal Leakage.* The Commission's rules require specified MVPDs to comply with certain technical rules pertaining to signal leakage,¹⁷⁴ as well as reporting¹⁷⁵ and notification¹⁷⁶ requirements related thereto.¹⁷⁷ We expect that in general MVPDs that use Internet protocol to deliver video will not use aeronautical frequencies and thus will not be subject to these requirements.¹⁷⁸ We seek comment on this expectation, and any practical impact these obligations will have on Internet-based distributors of video programming that qualify as MVPDs. Will we need to amend our signal leakage rules if we adopt the Linear Programming Interpretation, and if so, how?

61. *Inside Wiring.* The Commission's cable inside wiring rules apply to all MVPDs.¹⁷⁹ In general terms, these rules govern the disposition of home wiring¹⁸⁰ and home run wiring¹⁸¹ after a subscriber terminates service. To what extent, if any, would these obligations affect Internet-based distributors of video programming that qualify as MVPDs, especially if they do not control the "last mile" of the transmission path used to deliver video programming to consumers but are affiliated with an entity that controls the transmission path? We expect that if we adopt the Linear Programming Interpretation that these inside wiring rules would not apply to Internet-based distributors of video programming.

62. *Commercial Loudness.* As required by the CALM Act,¹⁸² the Commission's rules require MVPDs to ensure that commercials are transmitted to consumers at an appropriate loudness level in accordance with a specified industry standard.¹⁸³ Depending on the size of the MVPD and the type of the commercial at issue (*i.e.*, inserted by the MVPD or embedded in the programming by a third-party), the Commission's rules may require an MVPD to install equipment and associated software or perform spot checks or both.¹⁸⁴ Do these requirements need to be modified to apply to Internet-based distributors of video programming that qualify as MVPDs, and if so, how? If the requirements do need to be modified, are there ways to make the rules less burdensome for Internet-based distributors of video programming while meeting our statutory mandates?

¹⁷⁴ See 47 C.F.R. § 76.610; see also 47 C.F.R. §§ 76.605(a)(12), 76.611, 76.612, 76.613, 76.614, 76.616, 76.617.

¹⁷⁵ See 47 C.F.R. §§ 76.1803 (signal leakage monitoring and reporting); 1.1705(a)(1) (FCC Form 320 – Basic Signal Leakage Performance Report).

¹⁷⁶ See 47 C.F.R. §§ 76.1804.

¹⁷⁷ The Commission is currently considering updating these rules to facilitate the transition from analog to digital transmission systems. See *Cable Television Technical and Operational Requirements*, Notice of Proposed Rulemaking, 27 FCC Rcd 9678 (2012).

¹⁷⁸ Section 76.610 provides that the specified Commission rules pertaining to signal leakage apply to "all MVPDs (cable and non-cable) transmitting carriers or other signal components carried at an average power level equal to or greater than 10^{-4} watts across a 25 kHz bandwidth in any 160 microsecond period, at any point in the cable distribution system in the frequency bands 108–137 and 225–400 MHz for any purpose." 47 C.F.R. § 76.610.

¹⁷⁹ See 47 C.F.R. §§ 76.802(l), 76.804(f), 76.805, 76.806(d); see also 47 U.S.C. § 544(i).

¹⁸⁰ See 47 C.F.R. § 76.5(l) (defining "cable home wiring" as the "internal wiring contained within the premises of a subscriber which begins at the demarcation point. Cable home wiring includes passive splitters on the subscriber's side of the demarcation point, but does not include any active elements such as amplifiers, converter or decoder boxes, or remote control units.").

¹⁸¹ See 47 C.F.R. § 76.800(d) (defining "home run wiring" as the "wiring from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop").

¹⁸² See Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. § 621).

¹⁸³ See 47 C.F.R. § 76.607; *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222 (2011).

¹⁸⁴ See 47 C.F.R. § 76.607.

63. *MDU Access.* The Commission's rules prohibit cable operators, common carriers (or their affiliates) that provide video programming, and OVS operators from enforcing or executing any provision in a contract that grants to it the exclusive right to provide any video programming service to a Multiple Dwelling Unit.¹⁸⁵ The Commission has sought comment on whether to extend this prohibition to other MVPDs.¹⁸⁶ To the extent the Commission were to do so, what impact, if any, would this prohibition have on Internet-based distributors of video programming that qualify as MVPDs? Is there any way a landlord could restrict a tenant's ability to access certain content over the Internet to prevent a tenant from accessing an Internet-based linear video service? Will we need to amend our MDU access rules if we adopt the Linear Programming Interpretation, and if so, how?

64. *Other Regulatory Issues.* We also seek comment on how other regulations should account for Internet-based distributors of video programming that qualify as MVPDs. For example, should we extend any cable or satellite-specific regulations to MVPDs more generally? If so, what would be our statutory basis for doing so?

2. Impact on Content Owners

65. As discussed in this section, our interpretation of the definition of an MVPD may impact content owners in their negotiations with broadcasters, cable networks, and MVPDs. We seek comment on these issues below.

a. Broadcast Content

66. Section 111 of the Copyright Act provides "cable systems" (as defined by the Copyright Act) a statutory license to retransmit copyrighted broadcast performances if the "cable system" pays a statutory fee for those performances.¹⁸⁷ Some content creators and owners contend that the Commission, in interpreting the definition of MVPD in the Communications Act, should be cognizant of the interplay between Section 111 of the Copyright Act and the Communications Act¹⁸⁸ and even suggest that a Commission decision interpreting the definition of MVPD to include Internet-based distributors would conflict with copyright law.¹⁸⁹ But the market and legal landscape has changed significantly since content creators and owners made those claims.¹⁹⁰ Therefore, we ask commenters to update the record with respect to how expanding the definition of MVPD in the Communications Act to include some Internet-based distributors interrelates with copyright law.

¹⁸⁵ See 47 C.F.R. § 76.2000(a); see also *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20260, ¶ 51 (2007) ("MDU Order and FNPRM"), *aff'd sub nom. Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009). The Commission's rules provide that an "MDU shall include a multiple dwelling unit building (such as an apartment building, condominium building or cooperative) and any other centrally managed residential real estate development (such as a gated community, mobile home park, or garden apartment); provided however, that MDU shall not include time share units, academic campuses and dormitories, military bases, hotels, rooming houses, prisons, jails, halfway houses, hospitals, nursing homes or other assisted living facilities." 47 C.F.R. § 76.2000(b).

¹⁸⁶ See *MDU Order and FNPRM*, 22 FCC Rcd at 20264-65, ¶¶ 61-62.

¹⁸⁷ 17 U.S.C. § 111.

¹⁸⁸ See Cablevision Comments at 16; Comcast Comments at 2 n.4; MPAA Comments at 2; Disney Reply Comments at 5; Fox Reply Comments at 6.

¹⁸⁹ See Time Warner Reply Comments at 3; MPAA Comments at 3.

¹⁹⁰ See *supra* ¶¶ 10-11.

b. Cable-Affiliated Content

67. Through application of the program access rules, Internet-based distributors that qualify as MVPDs will be entitled to non-discriminatory access to cable-affiliated networks.¹⁹¹ Generally speaking, a programmer licenses content from various content creators, aggregates the content into a network, and then licenses the network to MVPDs for distribution.¹⁹² Discovery claims, however, that cable-affiliated networks cannot license all of the content displayed on their networks for distribution on the Internet because they frequently do not possess the right to authorize Internet distribution of that content.¹⁹³ Rather, Discovery argues that (i) content creators frequently retain for themselves the rights to Internet distribution in order to generate a separate revenue stream by displaying the content on their own websites or by selling the content to other video providers;¹⁹⁴ and (ii) obtaining Internet distribution rights is simply too expensive for some networks.¹⁹⁵ What effect should the Copyright Office's decisions have on our statutory and policy analysis?

68. To what extent do cable-affiliated networks possess – or have the ability to negotiate for – the right to authorize distribution of content displayed on their network over the Internet? If we adopt the Linear Video Interpretation, what impact does that have on existing rights for content distribution? We note that some cable-affiliated networks are made available over the Internet to authenticated MVPD subscribers.¹⁹⁶ Does this reflect that cable-affiliated programmers possess the right to authorize distribution of content displayed on their network over the Internet?¹⁹⁷ Does the concern about lack of rights to authorize Internet distribution of content apply only with respect to content not owned by the network? To what extent do cable-affiliated networks own the content displayed on their networks (or are affiliated with the content creators or otherwise possesses all of the rights with respect to distribution of that content)? To what extent is the content displayed on cable-affiliated networks owned by entities unaffiliated with the network?

69. Would or should the adoption of the proposed definition of an MVPD have any effect on a cable-affiliated network that does not possess the right to authorize Internet distribution of content displayed on its network? In other words, would or should the network be required to obtain such rights to comply with the program access rules if certain Internet-based distributors qualify as MVPDs? We seek comment on how the resolution of this question would impact content creators, cable-affiliated programmers, and MVPDs, either traditional or Internet-based. We also seek comment on our authority to require entities to enter into contracts for these distribution rights.

¹⁹¹ See *supra* ¶¶ 40-42.

¹⁹² See Discovery Comments at 10.

¹⁹³ See Discovery Comments at 10; Discovery Reply Comments at 6.

¹⁹⁴ See Discovery Comments at 10; Discovery Reply Comments at 6.

¹⁹⁵ See Discovery Comments at 11; see also Ovation Reply Comments at 4.

¹⁹⁶ 14th Annual Report, 27 FCC Rcd at 8612, ¶ 6 (describing “TV Everywhere” as “an MVPD initiative, which allows subscribers of certain services to access video programming on stationary and mobile Internet-connected devices, including television sets, computers, tablets, and smartphones”); *id.* at 8618, ¶ 21 n.30 (“TV Everywhere is an authentication system whereby certain movies and television shows are accessible online via a variety of display devices including personal computer, mobile, and television – but only if you can prove (or ‘authenticate’) that you have a subscription to an MVPD.”); *id.* at 8738, ¶ 287 (“TV Everywhere services allow MVPDs to compete with unaffiliated OVDs by providing free on-demand Internet video to authenticated MVPD customers.”).

¹⁹⁷ But see *Comcast/NBCU Order*, 26 FCC Rcd at 4280, ¶ 105 (“The Applicants further note that they may lack the rights necessary to provide certain programming online on an unauthenticated basis.”).

c. Non-Broadcast, Non-Cable-Affiliated Content

70. If we were to require cable-affiliated networks to obtain Internet distribution rights from content creators to comply with the program access rules, what impact, if any, would or should this have on non-cable-affiliated networks? For example, Ovation claims that, if cable-affiliated networks are required to obtain Internet distribution rights, “marketplace pressures would foreseeably require other networks to do the same.”¹⁹⁸ We seek comment on this concern.

C. Regulatory Treatment of Cable Operators and DBS Providers that Provide Linear Video Services via IP

71. It seems evident that merely using IP to deliver cable service does not alter the classification of a facility as a cable system or of an entity as a cable operator. That is, to the extent an operator may provide video programming services over its own facilities using IP delivery within its footprint it remains subject to regulation as a cable operator. At the same time, we understand that some cable operators and DBS providers are exploring new business models that might be indistinguishable from other over-the-top (“OTT”) services.¹⁹⁹ As mentioned above, cable operators and DBS providers are obtaining rights for online distribution of content, and some have launched or may soon launch Internet-based video programming services.²⁰⁰ Below, we seek comment on the regulatory treatment of national OTT video services that a cable operator or DBS provider may provide nationally—as contrasted to the traditional services it offers.

1. Cable Service Provided via IP Over the Operator’s Facilities

72. The Act defines a cable operator as, essentially, an entity that provides cable service over a cable system.²⁰¹ Thus, we must interpret the three terms – cable service, cable system, and cable operator – together to determine the proper regulatory treatment of IP-based services provided by cable operators. The Act defines cable service as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”²⁰² The Commission and other authorities have previously concluded that the statute’s definition of “cable service” includes linear IP video service.²⁰³

¹⁹⁸ Ovation Reply Comments at 4. See *Comcast/NBCU Order*, 26 FCC Rcd at 4267, ¶ 73 (“We also conclude that Comcast-NBCU will have increased leverage to negotiate restrictive online rights from third parties, again to the detriment of competition. Comcast-NBCU’s demand of restrictive online rights in exchange for carriage may also cause harms to consumer choice, diversity, and broadband investment.”); see also Public Knowledge Comments at 17-18 (“While the program access rules prevent an MVPD from keeping a programmer from being carried by other current MVPDs, nothing at the moment prevents a company like Comcast demanding, as a condition for being carried on Comcast, that the programmer stay off of online platforms.”).

¹⁹⁹ In this NPRM, we use the term OTT to refer to linear video services that travel over the public Internet and that cable operators do not treat as managed video services on any cable system.

²⁰⁰ See *supra* n.1.

²⁰¹ 47 U.S.C. § 522(5).

²⁰² 47 U.S.C. § 522(6).

²⁰³ See *Cable Television Technical and Operational Requirements*, 27 FCC Rcd 9678, 9681, ¶ 5 (referring to “IP delivery of cable service”); *Office of Consumer Counsel v. Southern New England Telephone Co.*, 515 F.Supp.2d 269, 276 (D. Conn. 2007), vacated on other grounds, 368 Fed.Appx. 244 (2d Cir. 2010) (“*Southern New England Telephone*”) (“The statutory language itself appears to require the conclusion that [IP-based] video programming service does constitute a ‘cable service,’ as defined by the Cable Act.”).

73. Second, to the extent a cable operator uses “a set of closed transmission paths” to provide cable service, as one providing IP video programming over its copper wire (including coaxial cable) or fiber optic cable does,²⁰⁴ its facility meets the definition of cable system:

a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility system.²⁰⁵

74. Finally, an entity that delivers cable services via IP is a cable operator to the extent it delivers those services as managed video services over its own facilities and within its footprint.²⁰⁶ This is compelled by the Act’s definition of a cable operator as a “person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.”²⁰⁷

75. IP-based service provided by a cable operator over its facilities and within its footprint must be regulated as a cable service not only because it is compelled by the statutory definitions; it is also good policy, as it ensures that cable operators will continue to be subject to the pro-competitive, consumer-focused regulations that apply to cable even if they provide their services via IP.

76. Congress and the Commission advanced several pro-competitive, consumer-focused values when they adopted the cable-specific provisions of the Act and the rules implementing these important provisions. The Act and our rules include many cable-specific requirements, including the following: annual regulatory fees;²⁰⁸ Emergency Alert System (“EAS”) requirements;²⁰⁹ the V-Chip;²¹⁰

²⁰⁴ The Commission previously analyzed the term “set of closed transmission paths,” and determined that Congress most likely meant a system of copper wire and/or fiber optic cable. See *Definition of a Cable Television System*, Report and Order, 5 FCC Rcd 7638, 7639, ¶ 7 (1990) (“by referring to a ‘closed’ transmission medium, the drafters contemplated that cable system facilities would use physically closed or shielded conducting media or ‘transmission paths,’ rather than radio waves alone. While the original Senate version of the Cable Act was not passed, we have no basis for thinking that the Senate and House did not share a common understanding of the virtually identical terms ‘closed transmission path’ and ‘closed transmission media’ (which itself was defined as a ‘transmission path’) that were used in their respective definitions of cable systems.”). The Commission also defined the word subscriber in the phrase “provided to multiple subscribers within a community” to mean “a member of the general public who receives broadcast programming distributed by a cable television system[] and does not further distribute it.” *Definition of a Cable Television System*, Report and Order, 5 FCC Rcd 7638, 7642, ¶ 32 (1990).

²⁰⁵ 47 U.S.C. § 522(7).

²⁰⁶ We note that this interpretation does not extend to services like “TV Everywhere” because they are not managed video services. We seek comment on how to treat such services below. See *infra* ¶ 78.

²⁰⁷ 47 U.S.C. § 522(5).

²⁰⁸ See 47 C.F.R. § 1.1155 (this rule specifically includes facilities-based IPTV services).

commercial limits in children's programs;²¹¹ network non-duplication;²¹² syndicated program exclusivity;²¹³ notice to broadcasters regarding: (i) deletion or repositioning of a broadcast signal,²¹⁴ (ii) a change in designation of principal headend,²¹⁵ (iii) change in technical configuration,²¹⁶ (iv) the provision of service to 1000 subscribers, thereby entitling broadcast stations to exercise non-duplication protection or syndicated exclusivity protection;²¹⁷ political programming and candidate access rules;²¹⁸ sponsorship identification;²¹⁹ lotteries;²²⁰ public inspection file;²²¹ public, educational, or governmental channels ("PEG");²²² program access;²²³ leased access;²²⁴ various reporting requirements;²²⁵ cross-ownership restrictions;²²⁶ prohibition on buy outs;²²⁷ national subscriber limits (horizontal ownership restriction);²²⁸

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²⁰⁹ See 47 C.F.R. §§ 11.1, 11.2(c)-(d), 11.11; *see also* 47 C.F.R. § 76.1711 (EAS recordkeeping requirements for cable systems).

²¹⁰ Congress adopted the V-chip requirement in 1996 as part of the Parental Choice in Television Programming Act. *See* 47 U.S.C. § 303(x) (added by The Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(c), 110 Stat. 56, 141 (1996)). Parents with a V-chip-equipped television set or converter box can block television programming based on its rating. *See Implementation of Section 551 of the Telecommunications Act of 1996, Video Programming Ratings*, Report and Order, 13 FCC Rcd 8232 (1998) ("TV Parental Guidelines Order"). The V-chip requirement currently applies to certain television broadcast receivers (based on size) and digital television receivers without an associated display device. *See* 47 C.F.R. § 15.120(b); *Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings*, Report and Order, 13 FCC Rcd 11248 (1998).

²¹¹ *See* 47 C.F.R. §§ 76.225, 76.1703.

²¹² *See* 47 C.F.R. §§ 76.92-95.

²¹³ *See* 47 C.F.R. §§ 76.101-110.

²¹⁴ *See* 47 U.S.C. § 534(b)(9); *see also* 47 C.F.R. § 76.1601.

²¹⁵ *See* 47 C.F.R. §§ 76.1607, 76.1708.

²¹⁶ *See* 47 C.F.R. § 76.1608.

²¹⁷ *See* 47 C.F.R. § 76.1609.

²¹⁸ *See* 47 U.S.C. § 315; *see also* 47 C.F.R. §§ 76.205-206, 76.1611, 76.1701.

²¹⁹ *See* 47 C.F.R. §§ 76.1615, 76.1715.

²²⁰ *See* 47 C.F.R. § 76.213.

²²¹ *See* 47 C.F.R. §§ 76.1700-10, 1715-16. *See also Media Bureau Seeks Comment on Petition for Rulemaking Filed by the Campaign Legal Center, Common Cause and the Sunlight Foundation Seeking Expansion of Online Public File Obligations to Cable and Satellite TV Operators*, DA 14-1149, 79 Fed. Reg. 51136 (MB 2014) (seeking comment on a petition for rulemaking to require cable systems and satellite operators to post their public files to the Commission's online database).

²²² *See* 47 U.S.C. §§ 531, 541(a)(4)(B).

²²³ *See* 47 U.S.C. § 548; *see also* 47 C.F.R. §§ 76.1001-1002.

²²⁴ *See* 47 U.S.C. § 532; *see also* 47 C.F.R. §§ 76.701, 76.970-978, 76.1707.

²²⁵ *See* 47 C.F.R. § 76.403 (cable television system report: FCC Form 325); 47 C.F.R. § 76.1610 (change of cable system operational information (FCC Form 324)); 47 C.F.R. § 76.1801 (cable registration statement (FCC Form 322)).

²²⁶ *See* 47 U.S.C. § 533(a); *see also* 47 C.F.R. § 27.1202; 47 C.F.R. § 76.501.

²²⁷ *See* 47 U.S.C. § 572; *see also* 47 C.F.R. §§ 76.505, 76.1404, 76.1616.

²²⁸ *See* 47 U.S.C. § 533(f)(1)(A); 47 C.F.R. § 76.503(a); *see also Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009) (vacating the Commission's cable horizontal ownership limits).

limits on carriage of vertically integrated programming;²²⁹ various franchising requirements;²³⁰ rate regulation, including a requirement to offer a basic service tier, a prohibition on negative option billing, an obligation to offer a tier buy-through option, and requirements pertaining to information on subscriber bills;²³¹ regulation of services, facilities, and equipment, including minimum technical standards and notification to customers of changes in rates, programming services, or channel positions;²³² consumer protection and customer service;²³³ consumer electronics equipment compatibility, including prohibition on scrambling or encrypting the basic service tier;²³⁴ support for unidirectional digital cable products (Plug and Play);²³⁵ protection of subscriber privacy;²³⁶ transmission of obscene programming;²³⁷ and scrambling of cable channels for non-subscribers.²³⁸

77. In particular, these obligations on cable operators are critical for noncommercial, local, and independent broadcasters. Sections 614 and 615 of the Communications Act and implementing rules adopted by the Commission entitle commercial and noncommercial television broadcasters to carriage on local cable television systems.²³⁹ When the Commission proposed implementing regulations, it noted that Congress emphasized strongly that the public interest demands that cable subscribers be able to access their local commercial and noncommercial broadcast stations.²⁴⁰ That congressional policy directive persists today; and the continued application of these requirements to cable operators that provide video programming over IP will ensure that local broadcasters will be carried, and that other cable-centric regulations will apply, regardless of the method that the cable operator uses to deliver the cable service.²⁴¹

2. Cable Operators Offering OTT Services

78. We tentatively conclude that video programming services that a cable operator may offer over the Internet should not be regulated as cable services. Some cable operators have announced plans

²²⁹ See 47 U.S.C. § 533(f)(1)(B); 47 C.F.R. § 76.504(a); see also *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (reversing and remanding the Commission's cable vertical ownership limits).

²³⁰ See 47 U.S.C. §§ 541, 542, 545, 546, 547, 555, 555a; see also 47 C.F.R. §§ 76.41, 76.502.

²³¹ See 47 U.S.C. § 543; see also 47 C.F.R. §§ 76.901-963, 76.980-990, 76.1402, 76.1605-1606, 76.1800, 76.1805.

²³² See 47 U.S.C. § 544; see also 47 C.F.R. §§ 76.601, 76.605, 76.609, 76.1602-1604, 76.1618, 76.1704-06, 76.1713, 76.1717.

²³³ See 47 U.S.C. § 552; 47 C.F.R. §§ 76.309, 76.985, 76.1619.

²³⁴ See 47 U.S.C. § 544a; 47 C.F.R. §§ 76.630, 76.1621-1622.

²³⁵ See 47 C.F.R. § 76.640.

²³⁶ See 47 U.S.C. § 551.

²³⁷ See 47 U.S.C. § 559; 47 C.F.R. § 76.702.

²³⁸ See 47 U.S.C. § 560.

²³⁹ See 47 U.S.C. §§ 534, 535; 47 C.F.R. §§ 76.55-62, 76.1614, 76.1617, 76.1709. Cable operators are required to carry the primary video, accompanying audio, and closed captioning data contained in line 21 of the vertical blanking interval and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. See 47 U.S.C. § 534(b)(3)(A); 47 C.F.R. §§ 76.62(e)-(f), 76.606.

²⁴⁰ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd. 8055, 8056, ¶ 4 (1992).

²⁴¹ We laud private market agreements like the public television digital cable carriage agreement that NCTA and the Association of Public Television Stations negotiated. See Letter from Diane Burstein, Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CS Docket No. 98-120 (filed Feb. 2, 2005). We note, however, that the parties negotiated that agreement in the shadow of the Commission's must carry regulations, which would have provided a safeguard to noncommercial broadcasters if those negotiations had broken down.

to offer video programming services via the Internet.²⁴² If a cable operator delivers video programming service over the Internet, rather than as a managed video service over its own facilities, we tentatively conclude that this entity would be (i) a cable operator with respect to its managed video service, and (ii) a non-cable MVPD under our proposed Linear Programming Interpretation with respect to its OTT service. To the extent a consumer located within a cable operator's footprint may access the cable operator's OTT service using that cable operator's broadband facilities for Internet access, how should this arrangement be classified? We tentatively conclude that such an OTT service, if provided to consumers without regard to whether they subscribe to the cable operator's managed video service, would be a non-cable MVPD service inside and outside of the operator's footprint, even if it is accessible over that cable operator's broadband facilities. We seek comment on whether there is any reason that our tentative conclusion should change if a cable operator provides an OTT service within its footprint only, rather than nationally. Would our analysis change if the OTT service were bundled with the cable service? Finally, we seek comment on the likely forms that new OTT services will take, and on both the application of the statutory definitions discussed above to such services and the policy implications of classifying these services.

3. DBS Providers Offering OTT Services

79. Some DBS providers offer linear OTT services (and have announced plans to expand those services) via the Internet.²⁴³ To the extent that DBS providers offer video programming services over the Internet, we tentatively conclude that those services should not be regulated as DBS service, and therefore should not be subject to the regulatory and statutory obligations and privileges of such services. If we adopt our proposed Linear Programming Interpretation, those services would be MVPD services subject to the regulatory and statutory obligations and privileges of such services.²⁴⁴ We reach this tentative conclusion because that service does not use the providers' satellite facilities, but rather relies on the Internet for delivery. We believe that this tentative conclusion is consistent with the Act and our rules.²⁴⁵ We seek comment on this tentative conclusion.

IV. PROCEDURAL MATTERS

80. Authority. This *Notice of Proposed Rulemaking* is issued pursuant to authority contained in Sections 4(i), 4(j), 303(r), 325, 403, 616, 628, 629, 634 and 713 of the Communications Act of 1934, as amended, 47 U.S.C §§ 154(i), 154(j), 303(r), 325, 403, 536, 548, 549, 554, and 613.

81. Ex Parte Rules. The proceeding initiated by this *Notice of Proposed Rulemaking* shall be treated as "permit-but-disclose" proceedings in accordance with the Commission's *ex parte* rules.²⁴⁶

²⁴² See *supra* n.1.

²⁴³ See DishWorld – Watch Live International TV Instantly, <http://www.dishworld.com/> (last visited Oct. 22, 2014); Edmund Lee, Scott Moritz and Alex Sherman, *Dish Leads in Race to Offer Online TV to Compete With Cable*, BLOOMBERG, March 15, 2014, available at <http://www.bloomberg.com/news/2014-03-04/dish-takes-lead-in-race-to-offer-streaming-tv-to-rival-cable.html>.

²⁴⁴ See *supra* ¶¶ 18-28.

²⁴⁵ See 47 C.F.R. § 25.103 (defining Direct Broadcast Satellite Service as "A radiocommunication service in which signals transmitted or retransmitted by Broadcasting-Satellite Service space stations in the 12.2-12.7 GHz band are intended for direct reception by subscribers or the general public. For the purposes of this definition, the term direct reception includes individual reception and community reception."). See also 47 U.S.C. § 335(b)(5) (stating that for purposes of that subsection, "'provider of direct broadcast satellite service' means—(i) a licensee for a Ku-band satellite system under part 100 of title 47 of the Code of Federal Regulations; or (ii) any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part 25 of title 47 of the Code of Federal Regulations." The Commission eliminated Part 100 from the rules in 2002; DBS satellite facilities now are licensed under Part 25 of the rules. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002).).

²⁴⁶ 47 C.F.R. §§ 1.1200 – 1.1216.

Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must: (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made; and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

82. **Filing Requirements.** Pursuant to Sections 1.415 and 1.419 of the Commission's rules,²⁴⁷ interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS").²⁴⁸

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

83. **Availability of Documents.** Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

²⁴⁷ See *id.* §§ 1.415, 1.419.

²⁴⁸ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

84. People with Disabilities. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

85. Additional Information. For additional information on this proceeding, contact Brendan Murray <mailto:murrayb@fcc.gov> of the Media Bureau, Policy Division, (202) 418-1573.

86. Regulatory Flexibility Analysis. As required by the Regulatory Flexibility Act of 1980, see 5 U.S.C. § 604, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in Appendix B. Written public comments are requested in the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this *Notice of Proposed Rulemaking* as set forth on the first page of this document, and have a separate and distinct heading designating them as responses to the IRFA.

87. Initial Paperwork Reduction Act Analysis. This Notice of Proposed Rulemaking seeks comment on a potential new or revised information collection requirement. If the Commission adopts any new or revised information collection requirement, the Commission will publish a separate notice in the Federal Register inviting the public to comment on the requirement, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3501-3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

V. ORDERING CLAUSES

88. Accordingly, **IT IS ORDERED**, pursuant to the authority contained in Sections 4(i), 4(j), 303(r), 325, 403, 616, 628, 629, 634 and 713 of the Communications Act of 1934, as amended, 47 U.S.C §§ 154(i), 154(j), 303(r), 325, 403, 536, 548, 549, 554, and 613, that this *Notice of Proposed Rulemaking* **IS ADOPTED**.

89. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Notice of Proposed Rulemaking* including the Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules

1. Amend § 76.5 to read as follows:

§ 76.5 Definitions.

* * * * *

(rr) *Linear Video*. A stream of video programming that is prescheduled by the programmer.

(ss) *Multichannel Video Programming Distributor*. A person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming. As used in this paragraph, channel means linear video without regard to the means by which the programming is distributed.

2. Amend § 76.64(d) to read as follows:

§ 76.64 Retransmission Consent.

* * * * *

(d) [Reserved]

* * * * *

3. Amend § 76.71(a) to read as follows:

§ 76.71 Scope of application.

(a) The provisions of this subpart shall apply to any corporation, partnership, association, joint-stock company, or trust engaged primarily in the management or operation of any cable system. Cable entities subject to these provisions include those systems defined in § 76.5(a), all satellite master antenna television systems serving 50 or more subscribers, and any multichannel video programming distributor. ~~For purposes of the provisions of this subpart, a multichannel video programming distributor is an entity such as, but not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, or a video dialtone program service provider, who makes available for purchase, by subscribers or customers, multiple channels of video programming, whether or not a licensee.~~ Multichannel video programming distributors do not include any entity which lacks control over the video programming distributed. For purposes of this subpart, an entity has control over the video programming it distributes, if it selects video programming channels or programs and determines how they are presented for sale to consumers. Notwithstanding the foregoing, the regulations in this subpart are not applicable to the owners or originators (of programs or channels of programming) that distribute six or fewer channels of commonly-owned video programming over a leased transport facility. For purposes of this subpart, programming services are "commonly-owned" if the same entity holds a majority of the stock (or is a general partner) of each program service.

* * * * *

4. Amend § 76.905(d) to read as follows:

§ 76.905 Standards for identification of cable systems subject to effective competition.

* * * * *

(d) [Reserved]

* * * * *

5. Amend § 76.1000(e) to read as follows:

§ 76.1000 Definitions.

* * * * *

(e) Multichannel video programming distributor. The term "multichannel video programming distributor" means an entity that falls under the definition provided in Section 76.5(rr) ~~engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator,~~ as well as buying groups or agents of all such entities.

Note to paragraph (e): A video programming provider that provides more than one channel of video programming on an open video system is a multichannel video programming distributor for purposes of this subpart O and Section 76.1507.

* * * * *

6. Amend § 76.1200(b) to read as follows:

§ 76.1200 Definitions.

* * * * *

(b) [Reserved]

* * * * *

7. Amend § 76.1300(d) to read as follows:

§ 76.1300 Definitions.

* * * * *

(d) Multichannel video programming distributor. The term "multichannel video programming distributor" means an entity that falls under the definition provided in Section 76.5(rr) ~~engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator,~~ as well as buying groups or agents of all such entities.

* * * * *

APPENDIX B

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking ("*NPRM*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *NPRM*. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").² In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rule Changes

2. The *NPRM* seeks comment on a proposed interpretation of the definition of "multichannel video programming distributor," or MVPD. The Communications Act defines MVPD as

[A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.⁴

3. Under the Commission's proposed interpretation of this definition, providers of multiple streams of pre-scheduled online video (i.e., linear video channels) that are available for purchase will be considered MVPDs. We believe that this interpretation reflects the changing market for video services as more subscription linear video is made available online. As an alternative, we seek comment on an interpretation of the definition of MVPD that would require an entity to also control the physical means—the "transmission path—that the entity uses to deliver its video programming. We believe that it is important for the Commission to provide guidance on the definition of MVPD because companies are experimenting with new business models based on Internet distribution.

4. We seek comment from the public about the effect that this interpretation will have. We seek comment on the potential benefits of this rule change for online video providers, namely program access⁵ and retransmission consent⁶ protections. We also seek comment on the potential burdens on online video providers relating to (i) program carriage;⁷ (ii) the competitive availability of navigation devices (including the integration ban);⁸ (iii) good faith negotiation with broadcasters for retransmission consent;⁹ (iv) Equal Employment Opportunity ("EEO");¹⁰ (v) closed captioning;¹¹ (vi) video description;¹²

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ 47 U.S.C. § 522(13); see also 47 C.F.R. §§ 76.64(d), 76.71(a), 76.905(d), 76.1000(e), 76.1200(b), 76.1300(d).

⁵ See 47 U.S.C. § 548; 47 C.F.R. §§ 76.1000-1004. Among other things, these rules require cable-affiliated programmers to make their programming available to MVPDs on nondiscriminatory rates, terms, and conditions.

⁶ See 47 U.S.C. § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65. Among other things, these rules require broadcasters to negotiate in good faith with MVPDs for retransmission consent.

⁷ See 47 U.S.C. § 536; 47 C.F.R. §§ 76.1300-1302.

⁸ See 47 U.S.C. § 549; 47 C.F.R. §§ 76.1200-1210.

⁹ See 47 U.S.C. § 325(b)(3)(C)(iii); 47 C.F.R. § 76.65(b).

¹⁰ See 47 C.F.R. §§ 76.71-79, 76.1792, 76.1802.

(vii) access to emergency information;¹³ (vi) signal leakage;¹⁴ (vii) inside wiring;¹⁵ and (viii) the loudness of commercials. We invite comment on any other effects that these rules may have.

B. Legal Basis

5. The proposed action is authorized pursuant to Sections 4(i), 4(j), 303(r), 325, 403, 616, 628, 629, 634 and 713 of the Communications Act of 1934, as amended, 47 U.S.C §§ 154(i), 154(j), 303(r), 325, 403, 536, 548, 549, 554, and 613.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

6. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.¹⁶ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁸ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹⁹ Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

7. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.”²⁰ The SBA has developed a small business size standard for this category, which is: all such
(Continued from previous page) _____

¹¹ See 47 C.F.R. § 79.1.

¹² See 47 C.F.R. § 79.3.

¹³ See 47 C.F.R. § 79.2.

¹⁴ See 47 C.F.R. § 76.610; see also 47 C.F.R. §§ 76.605(a)(12), 76.611, 76.614, 76.1803; 1.1705(a)(1) (FCC Form 320 – Basic Signal Leakage Performance Report).

¹⁵ See 47 C.F.R. §§ 76.800-806.

¹⁶ 5 U.S.C. § 603(b)(3).

¹⁷ 5 U.S.C. § 601(6).

¹⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

¹⁹ 15 U.S.C. § 632.

²⁰ U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television (CCTV) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

businesses having 1,500 or fewer employees.²¹ Census data for 2007 shows that there were 3,188 that operated for that entire year.²² Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.²³ Therefore, under this size standard, we estimate that the majority of such businesses can be considered small entities.

8. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.²⁴ Industry data shows that there were 1,100 cable companies at the end of December 2012.²⁵ Of this total, all but ten cable operators nationwide are small under this size standard.²⁶ In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²⁷ Current Commission records show 4,945 cable systems nationwide.²⁸ Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 or more subscribers, based on the same records. Thus, under this standard, we estimate that most cable systems are small entities.

9. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."²⁹ There are approximately 56.4 million incumbent cable video subscribers in the United States today.³⁰ Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a

²¹ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

²² U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

²³ *Id.*

²⁴ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection And Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, MM Docket No. 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408, ¶ 28 (1995).

²⁵ NCTA, Industry Data, Number of Cable Operating Companies (December 2012), <http://www.ncta.com/Statistics.aspx> (visited Feb. 21, 2014). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-6, ¶ 24 (2013) ("15th Annual Competition Report").

²⁶ See SNL Kagan, "Top Cable MSOs – 09/13 Q"; available at <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2013Q3&sortcol=subscribersbasic&sortorder=desc>. We note that, when applied to an MVPD operator, under this size standard (*i.e.*, 400,000 or fewer subscribers) all but 14 MVPD operators would be considered small. See NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data> (visited Feb. 21, 2014). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) ("CALM Act Report and Order") (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

²⁷ 47 C.F.R. § 76.901(c).

²⁸ The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on Aug. 28, 2013. A cable system is a physical system integrated to a principal headend.

²⁹ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

³⁰ See NCTA, Industry Data, Cable Video Customers (2012), <http://www.ncta.com/industry-data> (visited Feb. 21, 2014).

small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.³¹ Based on available data, we find that all but ten incumbent cable operators are small entities under this size standard.³² We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.³³ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

10. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.”³⁴ The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.³⁵ The 2007 U.S. Census indicates that 808 firms in this category operated in that year. Of that number, 709 had annual receipts of \$25,000,000 or less, and 99 had annual receipts of more than \$25,000,000.³⁶ Since the Census has no additional classifications on the basis of which to identify the number of stations whose receipts exceeded \$38.5 million in that year, the Commission concludes that the majority of television stations were small under the applicable SBA size standard.

11. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,387 stations.³⁷ Of this total, 1,221 stations (or about 88 percent) had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on July 2, 2014. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 395.³⁸ NCE stations are non-profit, and therefore considered to be small entities.³⁹ Based on these data, we estimate that the majority of television broadcast stations are small entities.

12. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations⁴⁰ must be included. Our estimate, therefore, likely

³¹ 47 C.F.R. § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (Cable Services Bureau 2001).

³² See NCTA, *Industry Data, Top 25 Multichannel Video Service Customers* (2012), <http://www.ncta.com/industry-data> (visited Feb. 21, 2014).

³³ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.901(f).

³⁴ U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

³⁵ 13 C.F.R. § 121.201; 2012 NAICS code 515120.

³⁶ U.S. Census Bureau, Table No. EC0751SSSZ4, *Information: Subject Series – Establishment and Firm Size: Receipts Size of Firms for the United States: 2007* (515120), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table

³⁷ See *Broadcast Station Totals as of June 30, 2014*, Press Release (MB rel. July 9, 2014) (*Broadcast Station Totals*) at https://apps.fcc.gov/edocs_public/attachmatch/DOC-328096A1.pdf.

³⁸ See *Broadcast Station Totals*, *supra*.

³⁹ See generally 5 U.S.C. §§ 601(4), (6).

⁴⁰ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 21.103(a)(1).

overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

13. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.⁴¹ These stations are non-profit, and therefore considered to be small entities.⁴²

14. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, Wired Telecommunications Carriers,⁴³ which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁴⁴ Census data for 2007 shows that there were 3,188 firms that operated for that entire year.⁴⁵ Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.⁴⁶ Therefore, under this size standard, the majority of such businesses can be considered small entities. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled "Cable and Other Program Distribution." As of 2002, the SBA defined a small Cable and Other Program Distribution provider as one with \$12.5 million or less in annual receipts.⁴⁷ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.⁴⁸ Each currently offers subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we

⁴¹ See Jan. 8, 2014 Broadcast Station Totals Press Release.

⁴² See generally 5 U.S.C. §§ 601(4), (6).

⁴³ See 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry." (*Emphasis* added to text relevant to satellite services.) U.S. Census Bureau, 2012 NAICS Definitions, "517110 Wired Telecommunications Carriers," at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁴⁴ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

⁴⁵ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Etab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁴⁶ *Id.*

⁴⁷ See 13 C.F.R. § 121.201, NAICS code 517510 (2002).

⁴⁸ See 15th Annual Competition Report, 28 FCC Rcd at 10507, ¶ 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at 10507, 10546, ¶¶ 27, 110-11.

believe it is unlikely that a small entity as defined under the superseded SBA size standard would have the financial wherewithal to become a DBS service provider.

15. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, Wired Telecommunications Carriers,⁴⁹ which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.⁵⁰ Census data for 2007 shows that there were 3,188 firms that operated for that entire year.⁵¹ Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.⁵² Therefore, under this size standard, the majority of such businesses can be considered small entities.

16. *Home Satellite Dish (HSD) Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.⁵³ The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁵⁴ Census data for 2007 shows that there were 3,188 firms that operated for that entire year.⁵⁵ Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.⁵⁶ Therefore, under this size standard, the majority of such businesses can be considered small entities.

17. *Open Video Systems.* The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.⁵⁷ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁵⁸

⁴⁹ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

⁵⁰ See *id.*

⁵¹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁵² *Id.*

⁵³ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

⁵⁴ See *id.*

⁵⁵ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁵⁶ *Id.*

⁵⁷ 47 U.S.C. § 571(a)(3)-(4); see *Implementation of Section 19 of the 1992 Cable Act and Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Report, 24 FCC Rcd 542, 606, ¶ 135 (2009) ("13th Annual Competition Report").

⁵⁸ See 47 U.S.C. § 573.

OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”⁵⁹ The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees.⁶⁰ Census data for 2007 shows that there were 3,188 firms that operated for that entire year.⁶¹ Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.⁶² Therefore, under this size standard, we estimate that the majority of these businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service.⁶³ Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.⁶⁴ The Commission does not have financial or employment information regarding the other entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

18. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.”⁶⁵ The SBA has developed a small business size standard for this category, which is: all such businesses having \$38.5 million dollars or less in annual revenues.⁶⁶ Census data for 2007 show that there were 396 firms that operated for that entire year.⁶⁷ Of that number, 349 operated with annual revenues of \$24,999,999 dollars or less.⁶⁸ Forty-seven (47) operated with annual revenues of

⁵⁹ See 13 C.F.R. § 121.201, 2012 NAICS code 517110. This category of Wired Telecommunications Carriers is defined in part as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.” U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁶⁰ 13 C.F.R. § 121.201; 2012 NAICS code 517110.

⁶¹ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁶² *Id.*

⁶³ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsr.html>.

⁶⁴ See 13th Annual Competition Report, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer businesses that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

⁶⁵ U.S. Census Bureau, 2012 NAICS Definitions, “515210 Cable and Other Subscription Programming,” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁶⁶ 13 C.F.R. § 121.201; 2014 NAICS code 515210.

⁶⁷ See U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Receipts Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 515210, Table EC0751SSSZ2; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁶⁸ *Id.*

\$25,000,000 or greater⁶⁹ Thus, under this size standard, the majority of such businesses can be considered small entities.

19. *Motion Picture and Video Production.* These entities may be indirectly affected by our action. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials."⁷⁰ We note that establishments in this category may be engaged in various industries, including cable programming. The SBA has developed a small business size standard for this category, which is: all such businesses having \$32.5 million dollars or less in annual revenues.⁷¹ Census data for 2007 show that there were 9,095 firms that that operated that year.⁷² Of that number, 8,995 had annual receipts of \$24,999,999 or less, and 100 had annual receipts ranging from not less than \$25,000,000 to \$100,000,000 or more.⁷³ Thus, under this size standard, the majority of such businesses can be considered small entities.

20. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors."⁷⁴ We note that establishments in this category may be engaged in various industries, including cable programming. The SBA has developed a small business size standard for this category, which is: all such businesses having \$32 million dollars or less in annual revenues.⁷⁵ Census data for 2007 show that there were 450 firms that operated for that entire year.⁷⁶ Of that number, 434 had annual receipts of \$24,999,999 or less, and 16 had annual receipts ranging from not less than \$25,000,000 to \$100,000,000 or more.⁷⁷ Thus, under this size standard, the majority of such businesses can be considered small entities.

21. *Internet Publishing and Broadcasting and Web Search Portals.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in (1) publishing and/or broadcasting content on the Internet exclusively or (2) operating Web sites that use a search engine to generate and maintain extensive databases of Internet addresses and content in an easily searchable format (and known as Web search portals). The publishing and broadcasting establishments in this industry do not provide traditional (non-Internet) versions of the content that they publish or broadcast. They provide textual, audio, and/or video content of general or specific interest on the Internet exclusively. Establishments known as Web search portals often provide additional Internet services, such

⁶⁹ *Id.*

⁷⁰ U.S. Census Bureau, 2012 NAICS Definitions, NAICS Code 512110, at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁷¹ 13 C.F.R. § 121.201, 2012 NAICS code 512110.

⁷² See U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Receipts Size of Firms for the United States: 2007 – 2007 Economic Census," NAICS code 512110, Table EC0751SSSZ4; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁷³ See *id.*

⁷⁴ U.S. Census Bureau, 2012 NAICS Definitions, NAICS Code 512120, at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁷⁵ 13 C.F.R. § 121.201, 2012 NAICS code 512120.

⁷⁶ See U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Receipts Size of Firms for the United States: 2007 – 2007 Economic Census," NAICS code 512120, Table EC0751SSSZ4; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁷⁷ See *id.*

as e-mail, connections to other web sites, auctions, news, and other limited content, and serve as a home base for Internet users.”⁷⁸ The SBA has developed a small business size standard for this category, which is: all such businesses having 500 or fewer employees.⁷⁹ Census data for 2007 shows that there were 2,705 firms that operated for the entire year.⁸⁰ Of this total, 2,682 firms had fewer than 500 employees, and 13 firms had between 500 and 999 employees.⁸¹ Therefore, under this size standard, the majority of such businesses can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

22. The *NPRM* proposes to expand the scope of entities that would be subject to recordkeeping requirements. The *NPRM* seeks comment on the Commission’s proposal to interpret the definition of “multichannel video programming distributor” to include online linear subscription video providers. If the Commission adopts its proposed interpretation, online linear subscription video providers will be required to follow the Commission’s regulations that apply to MVPDs, which include recordkeeping requirements. The Commission seeks comment on the effect that this will have on online linear subscription video providers.

23. Specifically, small entities that are deemed MVPDs would be subject to seven main areas of regulation as MVPDs. The first area is program carriage, which prohibits MVPDs from (i) requiring a financial interest in a video programming vendor’s program service as a condition for carriage;⁸² (ii) coercing a video programming vendor to provide, or retaliating against a vendor for failing to provide, exclusive rights as a condition of carriage;⁸³ or (iii) unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage.⁸⁴ The second area is competitive availability of navigation devices, which requires MVPDs to allow consumers to attach non-harmful devices to their networks, separate security from their receiver devices, and explain to interested parties how to make compatible devices.⁸⁵ The third area is retransmission consent, which requires MVPDs to negotiate in good faith with broadcasters for carriage.⁸⁶ The fourth area is Equal Employment Opportunity (“EEO”), which (i) require MVPDs to provide equal opportunity in employment to all qualified persons and prohibit MVPDs from discriminating in employment based on

⁷⁸ U.S. Census Bureau, 2012 NAICS Definitions, “519130 Internet Publishing and Broadcasting and Web Search Portals” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. Examples of this category are: Internet book publishers, Internet sports sites, Internet entertainment sites, Internet video broadcast sites, Internet game sites, Internet news publishers, Internet periodical publishers, Internet radio stations, Internet search portals, Web search portals, and Internet search web sites.

⁷⁹ 13 C.F.R. § 121.201; NAICS code 519130.

⁸⁰ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Firms for the United States: 2007 – 2007 Economic Census,” NAICS code 519130, Table EC0751SSSZ5; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

⁸¹ *Id.*

⁸² See 47 C.F.R. § 76.1301(a); see also 47 U.S.C. § 536(a)(1).

⁸³ See 47 C.F.R. § 76.1301(b); see also 47 U.S.C. § 536(a)(2).

⁸⁴ See 47 U.S.C. § 536; 47 C.F.R. §§ 76.1300-1302.

⁸⁵ See 47 U.S.C. § 549; 47 C.F.R. §§ 76.1200-1210. Per Section 106 of the STELA Reauthorization Act of 2014, Pub. L. No. 113-200, the requirement that MVPDs rely on separate security in the devices that they provide to consumers terminates on December 4, 2015.

⁸⁶ See 47 U.S.C. § 325(b)(3)(C)(iii); 47 C.F.R. § 76.65(b).

race, color, religion, national origin, age, or sex;⁸⁷ (ii) require MVPDs to engage in certain outreach and recruitment activities;⁸⁸ and (iii) require MVPDs to comply with certain reporting and recordkeeping requirements.⁸⁹ The fifth area is closed captioning, which requires MVPDs to provide closed captioning, defined as the “visual display of the audio portion of video programming pursuant to the technical specifications set forth in this part.”⁹⁰ The sixth area video description and access to emergency information, which require MVPDs to make programming and emergency information accessible to the blind and visually impaired.⁹¹ And finally, MVPDs are required to meet certain standards to mitigate the loudness of commercials.⁹²

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

24. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁹³

25. The *NPRM* proposes to interpret the term MVPD to include all multichannel, subscription linear video providers, including Internet-based providers. The MVPD seeks comment on whether to phase in application of its rules to online linear subscription video providers, or whether to waive the rules in certain instances. The Commission has never proposed an interpretation of the term MVPD, and now seeks comment on the effect of the proposed interpretation, specifically whether the interpretation will burden online linear subscription video providers without a corresponding public interest benefit. The Commission proposes this interpretation, however, because it believes that it will provide small entities with access to programming that will allow those entities to compete with larger incumbent providers. The Commission understands that with MVPD status comes certain regulatory obligations (as summarized in Section D above), and the Commission seeks comment on whether the regulatory privileges—*i.e.*, access to broadcast and cable-affiliated programming—outweigh those obligations. The Commission also seeks comment on whether the interpretation will have the desired effect of increasing video competition. To limit the burdens on small entities, the Commission also seeks comment on whether to waive regulations to the extent allowable under the Communications Act. And the Commission invites alternative interpretations of the term MVPD that would limit burdens on small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

None.

⁸⁷ See 47 U.S.C. § 554(b); 47 C.F.R. § 76.73(a); *see also* 47 U.S.C. § 554(c); 47 C.F.R. § 76.73(b).

⁸⁸ See 47 C.F.R. § 76.75(a)-(b), (e).

⁸⁹ See 47 C.F.R. §§ 76.75(c); 76.77(a), (d); 76.1702; 76.1802.

⁹⁰ 47 C.F.R. § 79.1; *see also* 47 U.S.C. § 613.

⁹¹ See 47 C.F.R. §§ 79.2, 79.3.

⁹² See 47 C.F.R. § 76.607; *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222 (2011).

⁹³ 5 U.S.C. § 603(c)(1)-(c)(4)

**STATEMENT OF
CHAIRMAN TOM WHEELER**

Re: *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261.

Today, we begin a process to expand Internet video competition with cable and satellite services. Our proposal will mean more alternatives for consumers beyond the traditional cable or satellite bundle, including giving consumers more options to buy the programming they want. When digital technology made video simply zeroes and ones, it opened up the opportunity for new Internet-based competition to cable and satellite services. Yet efforts by new entrants to develop new video services have faltered because they could not get access to programming content that was owned by cable networks or broadcasters.

With this Notice of Proposed Rulemaking, the Commission moves to update the Commission's rules to give video providers who operate over the Internet – or any other method of transmission – the same access to programming that cable and satellite operators have. Big company control over access to programming should not keep programs from being available on the Internet. Today, we propose to break that bottleneck.

More specifically, we propose to update our interpretation of the definition of a multichannel video programming distributor (MVPD) to make it technology-neutral. Video is no longer tied to a certain transmission technology, so our interpretation of MVPD should not be tied to transmission facilities. Under our proposal, any providers that make multiple linear streams of video programming available for purchase would be considered MVPDs, regardless of the technology used to deliver the programming. The effect of this change will be to improve the availability of programming that over-the-top providers need and consumers want.

History has shown us how such a change can expand consumer choice. Back in 1992, Congress said that DBS competitors should be able to negotiate in good faith for video content, even if it is owned by cable companies and broadcasters. Greater access to high-demand content spurred the growth of the satellite video business in the 1990s. We propose to do the same thing for over-the-top video providers who deliver content, not via cable or satellite, but via the Internet.

By facilitating access to such content, we expect Internet-based linear programming services to develop as a competitor to cable and satellite. Consumers should have more opportunities to buy the channels they want instead of having to pay for channels they don't want.

Our proposals will also help stimulate additional broadband deployment. An updated definition of MVPD would permit a new broadband competitor to offer customers the ability to reach a variety of over-the-top video packages, without having to enter the video business itself.

This NPRM marks the beginning, not the end of the process. While it proposes to interpret the term MVPD to encompass distributors of multiple linear video programming streams, including Internet-based services, it also asks for comment on an alternative interpretation that would require an MVPD to have control over a transmission path. The NPRM also asks for comment on:

- How each interpretation would impact MVPDs, consumers, and content owners, and how each would promote competition and broadband adoption;
- How the Commission should apply its retransmission consent "good faith" negotiation rules with respect to Internet-based MVPDs to protect local broadcasters; and
- Whether these proposals would affect the regulatory status of IP-delivered video services by cable operators and DBS providers.

This proposal is a big win for consumers and part of the Commission's broader efforts to speed the transition to all-IP networks in a way that serves the public interest – enabling innovation, while preserving core values like competition and consumer choice.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261.

Change is both constant and continuous.

As the media landscape evolves to reflect consumer demands and innovation, so too must our policies and regulatory regime. This has been a constant refrain for the FCC, as we seek to keep pace with the invariable changes in the global communications market.

Our tastes, fashions, viewpoints and values are influenced by content transferred over our television, radio, desktop, or handheld devices, and for those providers of content, this presents opportunity and obstacles, and holds both risk and reward.

Sound regulation typically requires a careful balancing of competing interests. In this context, it means our goals should be to define "multichannel video programming distributor" as broadly as possible to accommodate a new set of choices and offerings for consumers, while concurrently opening the avenue for innovation and new players. Multiple channels of video programming, including linear video providers who may not own their own facilities, should be included. We also want to insure that nascent, internet-based, services are not given competitive advantages over established MVPDs, who have well-defined obligations under the law.

With this vote, I believe we have adequately balanced these interests, by accomplishing three noteworthy public interest objectives: First, and foremost, we seek to provide more choice for consumers – always a positive goal. Second, we create a path for new entrants by encouraging a level playing-field of competition in a rich market. Third, we modernize our regulations so they comport with the new realities of a dynamic industry, and remain relevant in a competitive market as a result.

As the video marketplace continues to grow in ways, perhaps, unforeseen, I believe today's decision to expand the definition of MVPD will prove to be prescient.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261.

The future of watching video does not look like the past. That's because over the next few years, television will change more than it has over the last several decades.

The way we watch will change—where we watch, when we watch, and how we watch. Families huddling together in one room basking in the glow of a single screen will give way to gatherings with many screens and multiple programs. I know. It is already happening with my family in my home—and it is surely happening in countless others just like it, all across the country.

While online video has arrived, it is still in the early stages of development. The world's largest media companies and smallest upstarts are experimenting with innovative programming, business models, and pricing. As a result, the video market is evolving at a breathtaking pace, driven by both new technology and changing consumer expectations.

At the Commission we have an obligation to promote competition in the delivery of video services. We have the authority to update our rules to reflect the fact that video services are being offered over new platforms. We have the authority to interpret the statutory term multichannel video programming distributor (MVPD) to include providers of multiple streams of linear, over-the-top television. But I believe acknowledging authority is only the start of our inquiry. We also need to consider if we should alter our rules—and how. That's because our answer will impact the kind of video offerings that come to the market, the speed with which they arrive, and the prices consumers pay.

For this reason, I want to thank Chairman Wheeler and my colleagues for accommodating my request that this rulemaking seek comment on allowing, under certain circumstances, the ability to elect MVPD status. New service types are emerging fast—faster than any rulemaking process at this agency. What new video models succeed, what degree of self-curated viewing they enable, and what prices consumers are willing to pay are still up for grabs. If this kind of election can be administered easily, new providers would be able to avoid the legal conundrum involved in determining the regulatory status of novel services, seeking regulatory exemption, or pursuing a waiver of our rules before launching in the market. Moreover, this could be an elegant compromise for new services—between those who believe we should steer clear of policies for Internet-distributed video and those who believe clear rules are essential to get their service off the ground.

I look forward to the record that develops in response to the many questions in this rulemaking. But more than that, I look forward to the wide range of innovative video services that are developing. The future of watching—anytime and anywhere—is bound to be exciting.

**CONCURRING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Service*, MB Docket No. 14-261.

The video marketplace is changing, and changing fast. Internet-based video distribution—a flickering hope at the dawn of the Internet age—is a real and growing phenomenon. New entrants are cutting new paths, while established competitors are feeling pressure to adapt their business models. More than ever before, consumers are in the driver's seat when it comes to video content.

In evolving markets like these, the government should be hesitant to extend the outdated regulations and classifications of old. It's for this reason that I can't vote to approve this Notice of Proposed Rulemaking. In my view, the Commission's fundamental proposal—that certain Internet-based distributors of video programming should be regulated as multichannel video programming distributors (MVPDs), a mouthful of a term older than Internet video itself—is premature. And the legal analysis contained in the Notice is heavily slanted to support that result.

To be sure, this proposal is being packaged as a way to increase video competition. But given the dramatic, organic explosion in online video content over the last few years, I have my doubts as to whether additional regulation in this space is necessary. Indeed, I fear that it could impede continued innovation. I am also worried that this proposal will pave the way for more comprehensive regulation of Internet-based services.

Nonetheless, I am voting to concur for two reasons. First, I agree that it is time for the Commission to resolve the question of whether Internet-based distributors of video programming can be MVPDs, an issue that has been pending at the Commission for over four years. And second, the Notice has improved significantly since it was first circulated, as a result of changes that Commissioner O'Rielly, Commissioner Rosenworcel, and I suggested.

Among other things, the Notice now tentatively concludes that programmers' websites should be shielded from additional regulation. It also tentatively concludes that there should be regulatory parity between cable operators offering video programming over the Internet and other entities doing the same. Additionally, it asks in a more forthright manner about the interplay between the Commission's regulatory decisions and decisions that will need to be made independently by the U.S. Copyright Office. In particular, if the Commission were to decide that Internet-based distributors of video programming are MVPDs, subjecting broadcasters to the obligation to negotiate in good faith with them regarding retransmission consent, what would it mean in practice if the Copyright Office maintained its position that such Internet-based distributors do not qualify for the compulsory license? Would that be a workable regulatory scheme? While I had hoped to get public input on other questions as well,¹ doing so with respect to the issues mentioned above is significant.

I look forward to reviewing the record compiled in response to this Notice and to working collaboratively with my colleagues to create a regulatory framework that preserves for many years more what millions of consumers view as a golden age of video.

¹ For example, we should have asked whether the Commission's proposal could require us to regulate Internet pornography. This is obviously an uncomfortable question, but it won't vanish through omission.

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261.

I marvel at and embrace what the Internet and the many innovative programmers and designers have been able to bring to the world. Over the last 20 years or so, the Internet has revolutionized all communication capabilities. It is the ultimate disruptive force. Nowhere is this more evident than in the offering of video programming. According to industry experts, video already accounts for two-thirds of U.S. Internet traffic today and is estimated to increase to approximately 80 percent in just three years.¹ Once the domain of a few select providers, the video marketplace is changing right before our very eyes. Business models are adapting on the fly, and a robust video offering on the Internet is becoming more of a necessity for those companies seeking to compete in the years ahead.

With all of this dynamism in the online video marketplace, it makes this item particularly puzzling. While I can appreciate that the Commission may be trying to be forward looking, this item misses the mark. The Internet—and online video in particular—has grown to where it is today outside of our regulatory clutches, and the FCC trying to jump into this space now, especially without clear direction provided by the Congress, is highly questionable. As a government agency with little to no authority over the Internet, the best thing that the Commission can do is not get in the way.

Although I am amenable to seeking comment on these ideas and will concur to this notice, I am unlikely to support a future order based on the central proposal set forth in today's item. Specifically, it sets up a regime to treat an over-the-top (OTT) video programming provider as a Multichannel Video Programming Distributor (MVPD) if it is offering multiple streams of prescheduled video programming. I am concerned that the Commission's actions—either intentionally or unintentionally—may skew the marketplace in a harmful way. For instance, OTT video providers may seek to follow this model, if adopted, in order to take advantage of some of the perceived benefits instead of pursuing other more promising or innovative offerings that the market and consumers may prefer. Or, will some entities decide not to pursue a linear online offering—or worse remove content from the Internet—because of regulation? The structure proposed could have significant unintended consequences on this nascent industry still trying to define itself in the immediate term and on the entire video industry in the years to come. So why are we doing this?

A review of the supposed benefits of the item results in a short and undistinguished list. For instance, declaring an OTT video offering as an MVPD would allow it to take advantage of the Commission's Program Access and Retransmission Consent Rules. These prevent certain entities from improperly withholding cable-affiliated programming from competitors and require that negotiations between parties for broadcast programming be in good faith. These rules, however, do not guarantee a successful outcome, which is determined by private marketplace negotiations; they only bring parties to the table. But, OTT video providers are doing more than just talking these days. You only have to look at the deals cut by Sony, Dish and others to see that negotiations can commence and agreements can be struck without FCC involvement.

It has also been asserted by some people that, as a response to Commission action, the Registrar of Copyrights at the United States Copyright Office could extend compulsory copyright to online video programmers wishing to transmit broadcast signals. My indications are that the Copyright Office is not poised to act nor seeking our advice or input. Moreover, having spent some time over the years working

¹ Cisco, VNI Forecast Highlights, United States – 2018 Forecast Highlights, Internet Video, http://www.cisco.com/web/solutions/sp/vni/vni_forecast_highlights/index.html (last visited Dec. 18, 2014).

on potential amendments to the Copyright Act, I am not sure how much flexibility the Registrar would have to deem an MVPD potentially covered by this item as eligible for a compulsory copyright license. In fact, the U.S. District Court for the Southern District of New York has stated that being like a cable system does not make it a cable system for purposes of a compulsory copyright license.² Likewise, the statute seems to be fairly clear in its use of the terms “cable system” and “satellite carrier,” as opposed to “MVPD.”³

While there may be a few tangible upsides to this item, there are also potential downsides. And this regime is not permissive; if an OTT meets the criteria, the Commission would presumably declare the OTT to be an MVPD—even if the OTT doesn’t want such a declaration. I hope to engage with stakeholders going forward to understand how these burdens could impact current and future business models or plans.

Moreover, I am deeply concerned by the suggestion that a cable-affiliated network could be required to obtain the online rights to all of its programs, which it may not own today, to make them available to OTT MVPDs. This suggested mandate would occur even if the cable provider didn’t want the rights for its own business purposes. In effect, we would be forcing a company to negotiate and purchase copyrights for purposes of selling a more complete video package to an OTT MVPD. Really? Not only is this beyond offensive, it may just violate the U.S. Constitution. It is extremely unlikely that I would support such a requirement in any final version, and it may taint my view of an entire item.

Finally, and maybe most importantly, I am extremely troubled that the Commission may be headed down a path to capture OTT video providers within Title VI of the Communications Act. Although it would not subject such providers to the full panoply of requirements, shoehorning Internet video providers—the quintessential edge providers—into a framework that many people, including those in leadership in Congress, have deemed in need of review or overhaul is just plain wrong. As I have previously stated, this effort, combined with a number of other items seeking to subsume Internet offerings into Title II, would seem to leave little of the Internet free from the grasp of the Communications Act, a law not written for the Internet age. How is it that some edge providers fail to see that the Commission will seek to extend its authority to their business models or plans?

Although I have serious concerns about the direction in which the Commission is headed, I would like to thank the Chairman and my fellow colleagues for working together to get this item to a better place. A number of harsher proposals, such as mandatory carriage requirements, were removed or modified at my request. I would also like to recognize the Media Bureau staff who spent many late nights working on this notice.

² See *American Broadcasting Companies, Inc. et al. v. Aereo, Inc.*, Nos. 12-cv-1540, 12-cv-1543, slip op. (S.D.N.Y. Oct. 23, 2014).

³ See 17 U.S.C. §§ 111, 119, 122.

**ATTACHMENT B
(PUBLIC VERSION)**

***NOT INCLUDED BECAUSE ENTIRE
DOCUMENT IS CONFIDENTIAL***

**ATTACHMENT C
(PUBLIC VERSION)**

***NOT INCLUDED BECAUSE ENTIRE
DOCUMENT IS CONFIDENTIAL***

**ATTACHMENT D
(PUBLIC VERSION)**

***NOT INCLUDED BECAUSE ENTIRE
DOCUMENT IS CONFIDENTIAL***